

Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts

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LEGISLATIVE HISTORY: THE PHILOSOPHIES OF JUSTICES SCALIA AND BREYER AND THE USE OF LEGISLATIVE HISTORY BY THE WISCONSIN STATE COURTS

KENNETH R. DORTZBACH*

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I. INTRODUCTION

The validity of the use of legislative history has been debated for a number of years, but never has it received the high level of attention it does today. While the use of legislative history has waxed and waned, never has the institution of legislative history undergone such a direct assault as is being witnessed today in the U.S. Supreme Court. Led by Justice Scalia, judges and academics are questioning the value of this old tool for interpreting statutes. Such criticism is crystallizing into a coherent front of opposition.

While legislative history can take many different forms, there are two main types upon which courts rely. First, judges often either review

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"statements" made by legislators in reports issued by committees on pieces of legislation, or review actual statements made on the assembly or senate floor. Committee reports are meant to represent the consensus view of a committee or legislature. Actual statements made by legislators during debate can be persuasive if that individual played a key role in developing the legislation.

The second main type of legislative history referenced by judges is past drafts of bills or the sequence of development of legislation. Bills can go through numerous revisions where certain terms or ideas are either developed or eliminated. Judges will point to these alterations as proof of a legislature's intentions. Judges have gone beyond these two main types to find "legislative history" in almost any occurrence connected to a bill.¹ Many judges have grown so dependent on legislative history that one Supreme Court Justice remarked that because the legislative history was ambiguous, "it is clear that we must look primarily to the statutes themselves to find the legislative intent," rather than the other way around.²

The use of legislative history has been criticized for a variety of reasons. Critics claim legislative history lacks legitimacy because it was never voted on by a legislature or signed into law by an executive. Instead, legislative history exists in the form of committee reports written primarily by staff and read by few, if any, legislators. The "intent" which judges find in these reports may have existed, but critics claim that in many cases there was no collective intent to form the meaning assumed to be evidenced in committee reports.

Critics also charge that legislative history is indeterminate, and, therefore, subject to many possible interpretations. Because a bill

1. For the purposes of this paper, legislative history is defined as written materials pertaining to the legislation. Judges will sometimes resort to their own experiences or recollection of the development of legislation, but that is not "legislative history" in the sense that it can be referenced by another individual.

2. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 412 n.29 (1971); William T. Mayton, *Law Among The Pleonasm: The Futility and A Constitutionality of Legislative History in Statutory Interpretation*, 41 EMORY L.J. 113, 114 (1992). Mayton noted that Justice Marshall, in whose opinion the above quoted remark is found, has generally been true to the quote. *Id.* at 114. Mayton noted a study over the period 1971-79 which found that Justice Marshall cited legislative histories 464 times, the highest number among Supreme Court Justices in that period. *Id.* at 114, n.4 (citing Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 306 (1982)). The study also noted that "Justice Brennan was also a big user (436 cites). A more conservative member of the Court during this period, Justice White, referred to legislative history fewer times (292 cites)." *Id.*

involves the blending of many competing interests, there is often a variety of statements or drafts covering a particular issue that could be referenced by a judge as evidence of any number of views or trends, even when no such particular view or trend actually existed.

The third major criticism of legislative history is that it is easy to manipulate, both in its creation and in its interpretation. Committee reports are primarily written by legislative staff. These staff members are in close contact with lobbyists who can provide "advice" in the form of language to be added to final reports, language which no legislator has seen. This objection to the use of legislative history (manipulation by legislative staff) is different than the first objection (illegitimacy) that finds fault with legislative history created by staff members even with the best intentions. Manipulation can also occur when judges review past legislative history. One can weave together a variety of unrelated statements to form a coherent legislative intent where none really existed. This manipulation can be intentional or unintentional when stemming from the judge's natural biases. This objection is fundamentally different from the indeterminacy problem where judges with the best intentions simply cannot find an accurate statement of the legislature's intent.

The consideration of legislative history is more important than ever as our legal system is flooded with a rising number of cases involving statutory interpretation. As legislatures pass laws which are increasingly complicated, courts are forced to deal with more complicated questions of statutory interpretation. Legislative history can help clarify how statutes were intended to operate and interact. Its use and misuse will continue to be a central issue in judicial decisions.

In the midst of these developments, Justice Scalia was appointed to the Supreme Court. While Justice Scalia had criticized the use of legislative history during his term on the D.C. Circuit Court, he greatly expanded his attacks once he was free of a higher reviewing court. His recent opinions have set the tone of the legislative history debate. While Justice Scalia has clearly established the presence of this debate in the federal courts, little is written about how state courts deal with legislative histories. State courts hear a tremendous number of cases each year which involve statutory interpretation. The techniques state courts employ and the philosophies they follow dictate how lawyers should argue their cases. It is important to know if the changing trends in the federal courts are carrying over to the state courts. This article first addresses the philosophies of the two current and future leaders in the debate over legislative history—Justices Breyer and Scalia—then it

reviews the treatment and use of legislative history in Wisconsin state courts to see if Justice Scalia's ideas have had any effect. As the leaders of the opposing camps in the debate over legislative history, Justices Breyer's and Scalia's future opinions will do more to shape the continuing debate over legislative history than any other single factor.

Before turning to the views of Justices Breyer and Scalia, this article briefly presents some general problems at the Supreme Court level that arise from either relying too much on legislative history or ignoring it completely. After addressing the views of the two Supreme Court justices, this article discusses the formalist argument for textualism and the analogy between contract law and statutory interpretation.

In its second major section, this article reviews the use of legislative history in recent Wisconsin cases. Most state courts are similar in their treatment of legislative history; however, Wisconsin courts have interesting idiosyncrasies to consider when addressing questions of statutory interpretation.

Finally, this article will briefly review the effects textualism and Justice Scalia have had on other state courts. Several state courts have systemically rejected the use of legislative history itself, rather than simply criticizing its use in a particular case.

II. LEGISLATIVE HISTORY AND THE SUPREME COURT

A tremendous number of Supreme Court cases represent poor use of legislative history (either poor implementation or ignorance of legislative history). The greatest tension is usually not between conflicting legislative histories, but rather between the plain meaning of the statute and the legislative history which suggests a meaning other than that clearly in the text. These struggles have produced the greatest gulf in opinions over the use of legislative history.

The case which most clearly provides the basis for ignoring the plain meaning of a statute in favor of the supposed meaning contained in legislative history is *Church of the Holy Trinity v. United States*.³ The church had paid for an English clergyman to travel to the United States and become its minister. In apparent violation of a federal statute making it "unlawful for any person . . . in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States . . . to perform labor or service of any

3. 143 U.S. 457 (1892).

kind in the United States”⁴ While the statute prohibiting such travel was broad, it did specifically include certain exceptions (e.g., professional actors, artists, lecturers, and singers), but clergy were not included in this list.⁵ Nevertheless, the Supreme Court ruled “that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”⁶ The Court, relying on legislative history (primarily a committee report), found that Congress did not intend to exclude “brain toilers,” and, therefore, allowed the clergyman into the country.⁷ Depending on one’s point of view, the *Holy Trinity Church* decision provided either a basis or an excuse for the Court to ignore the plain meaning of a statute in its future decisions.

A. A Modern Abuse of Legislative History

A classic example of how legislative history was later used in conjunction with the doctrine created in *Holy Trinity Church* is *United Steelworkers of America v. Weber*,⁸ a case frequently mentioned by those who worry about judges ignoring the plain meaning of a statute’s text in favor of twisting legislative history to support their own views.⁹ In *Weber*, the Supreme Court considered whether Title VII of the Civil Rights Act of 1964 barred employers and unions from establishing voluntary affirmative action programs; specifically, a plan for on-the-job training which mandated a one-for-one quota for minority workers admitted to the program. A majority of the Court ruled that the Civil Rights Act did not bar such programs.¹⁰ The specific Title VII sections in question were sections 703(a),¹¹ 703(d),¹² and 703(j).¹³ Writing for

4. William Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 629 (1990) (quoting Act of February 26, 1885, ch. 164, 23 Stat. 332.)

5. *Id.* at 629.

6. *Holy Trinity Church*, 143 U.S. at 459.

7. *Id.* at 464; Eskridge, *supra* note 4, at 629.

8. 443 U.S. 193 (1979).

9. See Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803 (1994).

10. *United Steelworkers*, 443 U.S. at 193.

11. Section 703(a), 78 Stat. 255, (codified as amended, at 42 U.S.C. § 2000e-2 (a) (1994)) provides in pertinent part:

(a) . . . It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in

the majority, Justice Brennan cited *Holy Trinity Church* stating that reliance on the literal construction of sections 703(a) and (d) was misplaced because, "[i]t is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.'"¹⁴ Justice Brennan also cited legislative history which supported his claim that opening employment opportunities for African-Americans was the purpose of the statute; he argued that prohibiting all voluntary, race-conscious, affirmative action efforts would defeat that purpose.¹⁵

Both Chief Justice Burger and Justice Rehnquist dissented, criticizing Justice Brennan for rewriting the statute to suit his preferences. Justice Burger claimed that the majority simply ignored the plain language of sections 703(a) and (d), which clearly prohibited hiring and work preference practices based on race.¹⁶ He continued by writing that "the 'hard' cases always tempt judges to exceed the limits of their authority, as the Court does today by totally rewriting a crucial part of Title VII to reach a 'desirable' result."¹⁷ The Chief Justice also provided a scathing rebuke by quoting Justice Cardozo:

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to

any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e2 (a) (1994).

12. Section 703(d), 78 Stat. 256, (codified as amended at 42 U.S.C. § 2000e-2(d) (1994)), provides:

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

42 U.S.C. § 2000e-2(d)(1994).

13. Section 703(j), 78 Stat. 257 (codified as amended at 42 U.S.C. § 2000e-2(j) (1994)) provides:

Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual

42 U.S.C. § 2000e-2(j)(1994).

14. *United Steelworkers*, 443 U.S. at 201 (citing *Holy Trinity Church*, 143 U.S. at 459).

15. *Id.* at 203-07.

16. *Id.* at 218 (Burger, J., dissenting).

17. *Id.*

draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.¹⁸

Justice Rehnquist also stated that the plain meaning of sections 703(a) and (d), which was acknowledged by the majority, should clearly control; that is, when the language says an employer cannot consider race, employers are clearly prevented from having racial quotas as they did in *United Steel Workers*.

Justice Rehnquist went further in an exhaustive review of the legislative history of Title VII, indicating that the majority had not even properly cited legislative history. Two quotes exemplify the language cited by Justice Rehnquist. Representative Celler, Chairman of the House Judiciary Committee and the Congressman responsible for introducing the legislation, answered critics on the House floor: "The Bill would do no more than prevent . . . employers from discriminating against *or in favor of* workers because of their race, religion, or national origin."¹⁹ In the Senate, the floor manager of the bill, Senator Humphrey, said

The truth is that this Title forbids discriminating against anyone on account of race. This is the simple and complete truth about Title VII Title VII prohibits discrimination. In effect, it says that race, religion and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion.²⁰

More than anything else, *United Steel Workers* demonstrates that judges with the best intentions can ignore the plainest language to arrive at their desired policy result. If need be, judges can often find some legislative history to provide just enough support for their opinion, even when it appears that the majority of the legislative history points in the opposite direction. *United Steel Workers* demonstrates an obvious case of such manipulation, but the twisting of legislative history and blind denial of a statute's plain language are usually not so blatant. It is easier

18. *Id.* at 218-19 (Burger, J., dissenting) (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1982)).

19. *Id.* at 233 (Rehnquist, J., dissenting) (quoting 110 CONG. REC. 1518 (1964) (emphasis added)).

20. *Id.* at 238 (Rehnquist, J., dissenting) (quoting 110 CONG. REC. 6549 (1964)).

to abuse legislative history than to counter such abuse. By citing *Holy Trinity Church*, a judge signals he or she is about to detour from the plain meaning of the statute, but normally a lawyer or judge must dig through reams of speeches or history to counter a contrived argument based on faulty legislative history.

B. Problems With Ignoring Legislative History

Textualists create their own set of problems by ignoring legislative history.²¹ Sometimes a statute's plain meaning leads to a result which was not envisioned by the legislature, and legislative history provides the clearest "red-flag" warning of this fact. *Allen v. McCurry*²² is a case that demonstrates such a situation. The Supreme Court held in *Allen* that the Full Faith and Credit Act binds a federal court in a civil rights suit pursuant to section 1983 to the overlapping factual findings made by a state court in a prior criminal prosecution against the federal civil rights plaintiffs.²³ In writing the majority opinion, Justice Stewart found that the passage of section 1983 did not repeal or restrict the traditional doctrines of preclusion under collateral estoppel and that the Full Faith and Credit Act would bind federal courts to state court findings.²⁴ The Court failed to find any language in section 1983 plainly providing a different situation for such actions, nor found any mention of such an exception in the legislative history of section 1983.²⁵

Justice Blackmun's dissent, however, demonstrated that a review of the legislative history illustrated an intent contradicting the "silence" referred to by the majority. The purpose of section 1983 and the civil rights laws were to allow the federal courts to step in because some state courts were unable to provide adequate fora for race discrimination cases.²⁶ Consequently, it would defeat the purpose of the law to allow state courts to make factual determinations which might tie the hands of federal courts when those state courts were not trusted by Congress.

Consulting legislative history shows that not only the supporters²⁷

21. See Redish, *supra* note 9, at 803.

22. 449 U.S. 90 (1980).

23. *Id.* at 91. See also Redish, *supra* note 9, at 827-28.

24. *Allen*, 449 U.S. at 96-98.

25. *Id.* at 98.

26. *Id.* at 107-110 (Blackmun, J., dissenting).

27. See, e.g., *id.* at 107 n.4 (Blackmun, J., dissenting) (quoting remarks of Rep. Coburn, CONG. GLOBE, 42d Cong., 1st Sess. 460 (1871)). Representative Coburn stated:

The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as

of section 1983, but also the opponents,²⁸ understood the purpose of the statute.²⁹ This acknowledgment, coupled with the Court's recognition that "[section] 1983 embodies a strong congressional policy in favor of federal courts' acting as the primary and final arbiters of constitutional rights,"³⁰ led Justice Blackmun to conclude in his dissent that Congress clearly did not envision biased state courts gutting actions brought under section 1983 by making factual findings in previous decisions.³¹

While *Allen* demonstrates that ignoring legislative history can cause problems, that is not an argument for regularly using legislative history. As discussed throughout this article, there is a cost to making the review of legislative history a routine step in statutory analysis.

III. THE SUPREME COURT TODAY

A. Justice Breyer's Views

As an established proponent of using legislative history to determine the intent of a legislature when a statute is ambiguous, Justice Breyer has written specifically on such use.³² His appointment to the Court brought anticipation of charged debates between himself and Justice Scalia over the use of legislative history. While Justice Breyer supports using legislative history, his support is not open-ended. Justice Breyer recognizes legislative history can be abused, but believes this abuse can be contained:

I should like to defend the classical practice and convince you that those who attack it ought to claim victory once they have made judges more sensitive to problems of the abuse of legislative history; they ought not to condemn its use altogether. They

local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily.

Id.

28. See, e.g., *Allen*, 449 U.S. at 107-108 n.5 (Blackmun, J., dissenting) (quoting remarks of Rep. Rice, CONG. GLOBE, 42d Cong., 1st Sess. 396 (1871)). Representative Rice stated: [The bill] is but a bold and dangerous assertion of both the power and the duty of the Federal Government to intervene in the internal affairs and police regulations of the States and to suspend the exercise of their rightful authority It is at war with the spirit of a republican Government.

Id.

29. *Allen*, 449 U.S. 107-08 (Blackmun, J., dissenting).

30. *Id.* at 110 (Blackmun, J., dissenting).

31. *Id.*

32. Stephen Breyer, *On The Uses Of Legislative History In Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

should confine their attack to the outskirts and leave the citadel at peace.³³

According to Justice Breyer, there is nothing inherently wrong with judges using legislative history. Legislative history is one of many tools a judge has to perform their tasks, but sometimes that tool is not necessary.

In his analysis, Justice Breyer makes two assumptions. He assumes that "appellate courts are in part administrative institutions that aim to help resolve disputes and, while doing so, interpret, and thereby clarify, the law."³⁴ Second, he assumes that "law itself is a human institution, serving basic human or societal needs."³⁵ Both of these assumptions allow judges to call upon common values in order to achieve justice in accordance with reasonable expectations. Most judges would not disagree with these assumptions on their face, but the conclusions Justice Breyer and his supporters draw from them are more controversial.

Justice Breyer identifies five primary situations in which judges use legislative history: 1) To avoid an absurd result;³⁶ 2) To correct drafting errors;³⁷ 3) To identify specialized meanings;³⁸ 4) To identify the "reasonable purpose" of the statute;³⁹ and 5) To choose among

33. *Id.* at 847.

34. *Id.*

35. *Id.*

36. *Id.* at 848-49. Justice Breyer specifically refers to *Green v. Bock Laundry Machine Co.* *Id.* The Court in *Green* used legislative history to determine that Fed. R. Evid. 609(a)(1), which provides that evidence of a witness's prior convictions was admissible if the "court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant," would be absurd if it applied to civil defendants, and found that the rule only applied to criminal defendants. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509 (1989) (emphasis added).

37. Breyer, *supra* note 32, at 850-51. Justice Breyer refers to *United States v. Falvey* and the court's interpretation of 18 U.S.C. §485. *Id.* In *Falvey*, the court found that a federal criminal statute saying "[w]hoever . . . possesses any false, forged, or counterfeit coin . . . with intent to defraud any . . . person" was a drafting error and was not meant to protect against fraudulent use of South African currency in the United States. *United States v. Falvey*, 676 F.2d 871, 875 (1st Cir. 1982) (emphasis added).

38. Breyer, *supra* note 32, at 851-53. Justice Breyer refers to *Pierce v. Underwood* and the Court's interpretation of the Equal Access to Justice Act. *Id.* Under the act, a private party who wins a suit against the government is entitled to attorneys' fees unless the government's position was "substantially justified." *Pierce v. Underwood*, 487 U.S. 552, 556 (1988). Justice Breyer claims that the Court used legislative history to find that the word "substantial" meant "reasonable." Breyer, *supra* note 32, at 851-53.

39. Breyer, *supra* note 32, at 853-56. Justice Breyer refers to *In re Arnold Print Works, Inc.* *Id.* Under Congress' 1984 revision of federal bankruptcy law, federal Article I bankruptcy judges were allowed to hear and determine "core proceedings" without the consent of the involved parties. *In re Arnold Print Works, Inc.*, 815 F.2d 165, 166 (1st Cir. 1987).

reasonable interpretations of a politically controversial statute.⁴⁰ Justice Breyer claims the first three situations are relatively uncontroversial, but he recognizes that the fourth and fifth uses, however, can be very controversial.⁴¹

While Justice Breyer acknowledges that using legislative history has some pitfalls, he argues that using legislative history is significantly better than the alternative of relying primarily on canons of interpretation.

One criticism of the use of legislative history is that it lacks utility because such history is often misused.⁴² Justice Breyer leaves this charge largely unanswered. He claims that it has never been held that legislative history is always useful—only that it sometimes is.⁴³ Justice Breyer also states that many of those who argue against the use of legislative history point to Supreme Court cases that involve complex political issues and statutes with long legislative records.⁴⁴ However, most cases heard by lower courts do not involve such politically-laden questions and the legislative history is often plain enough to clarify the statute.⁴⁵

Justice Breyer also disregards the two primary constitutional arguments against the use of legislative history. First, while statutes are passed by a majority of the legislature and signed into law by the executive branch, no one votes on the legislative history which may accompany a bill. The second constitutional argument against using legislative history is that while power is vested in the elected members of a legislature, legislative staff and lobbyists write the floor statements, testimony, reports, and messages that make up the legislative history.

Justice Breyer believes that these arguments overstate their case.⁴⁶ He sets aside the first criticism by conclusively stating that no one

The court used legislative history to define what constituted a "core proceeding." Breyer, *supra* note 32, at 853-56.

40. Breyer, *supra* note 32, at 856-61. Justice Breyer refers to *Local Div. 589 v. Massachusetts*. *Id.* In *Local Div. 589*, the court used legislative history to determine that the Urban Mass Transportation Act of 1964 and its provision protecting the interests of employees did not preempt Massachusetts law allowing the state's Transit Authority from negotiating away certain powers it held. *Local Div. 589 v. Massachusetts*, 666 F.2d 618, 645 (1st Cir. 1981).

41. Breyer, *supra* note 32, at 862.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 861-862. There is some truth to this, but there are plenty of complicated cases heard in state courts which still make the use of legislative history problematic. See *infra* Parts VI and VII.

46. Breyer, *supra* note 32, at 862.

believes legislative history is the statute; rather, the legislative history is helpful by providing guidance, much like a dictionary.⁴⁷ Justice Breyer also dismisses the second criticism against legislative history by stating that each legislator is responsible for the work done by his staff and that this safeguard normally prevents "renegade" staff who might try to make policy on their own.⁴⁸

Another common criticism Justice Breyer addresses is the impossibility of ascertaining a collective legislative "intent" in general and the misleading attempt to do so by pointing to one particular speech or report.⁴⁹ Justice Breyer acknowledges that it is very difficult to discover the intent of a legislature, but maintains one certainly does exist.⁵⁰ Discovering intent from individual statements requires knowledge about the institution,⁵¹ and while most judges do not fully understand how the legislative branch works and what should be considered significant in the "horse-trading" world of the legislature, Justice Breyer believes this can be overcome.⁵²

Justice Breyer also claims that using legislative history is significantly preferable to the alternative, which is to rely more heavily upon canons of interpretation.⁵³ Relying on canons creates at least four problems according to Justice Breyer.⁵⁴ First, for every canon there exists an equal and opposite canon of construction.⁵⁵ This was best illustrated by Karl Llewellyn's famous list of canons with equally accepted canons that would provide opposite results.⁵⁶ One example is the canon, "[w]here various states have already adopted the statute, the parent state is followed,"⁵⁷ and the opposite canon, "[w]here interpretations of other states are inharmonious, there is no such restraint."⁵⁸ Another such

47. *Id.* at 863. This is a simplistic defense. While many judges recognize that the legislative history is not the statute itself, they allow the legislative history to speak for the statute and in effect take the place of the statute. See *supra* note 2.

48. Breyer, *supra* note 32, at 863-64.

49. *Id.* at 863-867.

50. *Id.*

51. *Id.*

52. Breyer, *supra* note 32, at 864-67. It should be noted that Justice Breyer is somewhat of an expert in this area himself after having served on the staff of the Senate Judiciary Committee for Senator Kennedy.

53. *Id.*

54. *Id.* at 869-874.

55. *Id.* at 869.

56. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

57. *Id.* at 402.

58. *Id.*

canon is, "[e]very word and clause must be given effect,"⁵⁹ and the opposite canon, "[i]f inadvertently inserted or if repugnant to the rest of the statute, they may be rejected as surplusage."⁶⁰

Justice Breyer briefly discusses three other problems.⁶¹ The sources of many interpretive canons are old and obscure.⁶² Breyer questions what validity a canon created in the nineteenth century has on statutes as we move into the twenty-first century.⁶³ Breyer also questions the legitimacy of the Supreme Court to adopt new canons, such as those proposed by Professor Cass Sunstein.⁶⁴ Finally, Justice Breyer doubts that using canons actually helps those who either write or are affected by legislation.⁶⁵ He opines that the average citizen would "probably find legislative history far more accessible than a Blackstone 'canon' based upon eighteenth century land law."⁶⁶ While such canons might be valuable if the U.S. had a more controlled drafting process like the United Kingdom, the U.S. system is more disjointed and less prone to hard and fast rules of interpretation.⁶⁷

Justice Breyer also claims that such a switch to canons would be unfair.⁶⁸ His charge is primarily grounded in the expectations of legislators, judges and the general public as to how legislation is passed and interpreted.⁶⁹ The switch would certainly not be smooth. Justice Breyer also claims legislative history allows for more public input and that not relying on sources such as hearings would reduce public influence in favor of powerful special interest groups.⁷⁰ He assumes there would simply be fewer hearings and that bills would suffer more floor amendments (because of poor initial drafting at the committee level), thereby creating disjointed legislation.⁷¹

59. *Id.* at 404.

60. *Id.*

61. Breyer, *supra* note 32, at 870.

62. *Id.*

63. *Id.*

64. *Id.* See also Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989). This criticism coupled with Justice Breyer's criticism of older canons creates a catch-22 for judges using canons: Courts should not rely too heavily on old canons, but also should not create new canons. What canons does this leave for Justice Scalia?

65. Breyer, *supra* note 32, at 870.

66. *Id.* at 870. This is questionable. It would certainly be cheaper for individuals to pay their lawyers to research canons than to research legislative history.

67. *Id.* at 871.

68. *Id.* at 871-72.

69. *Id.* at 872.

70. *Id.* at 873.

71. *Id.*

It is unclear why Justice Breyer believes there would be fewer hearings. Legislators would still need assistance in formulating legislation, but hearings and similar gatherings would not be used as frequently by judges in later years as sources for the meaning of statutory language. In the end, Justice Breyer tries to be sensitive to the charges leveled by critics of the use of legislative history. "The 'problem' of legislative history is its 'abuse,' not its 'use.' Care, not drastic change, is all that is warranted."⁷²

Justice Breyer has had few opportunities to write Supreme Court opinions involving statutory interpretation. In those few cases, he has looked, albeit not exclusively, to the legislative history of the statute to help him determine the meaning of the language.

Justice Breyer wrote the dissenting opinion in *United States v. Lopez*⁷³ (joined by Justices Stevens, Souter and Ginsburg), where the Court determined that the reach of the Commerce Clause was not so broad as to allow the federal government to regulate the carrying of a firearm within a certain distance from a school.⁷⁴ He addressed whether Congress could have had a rational basis for concluding that having guns around a school sufficiently affected interstate commerce.⁷⁵ Put another way, "[c]ould Congress rationally have found that 'violent crime in school zones,' through its effect on the 'quality of education,' significantly (or substantially) affects 'interstate' or 'foreign commerce'?"⁷⁶ Even though Justice Breyer acknowledged that Congress did not write specific "interstate commerce" findings into the law, he referred to the large number of government and private reports and government hearings which linked violence with poor education.⁷⁷ With so many reports, Justice Breyer concluded that

Congress could have found that gun-related violence near the classroom poses a serious economic threat (1) to consequently inadequately educated workers who must endure low paying jobs, . . . and (2) to communities and businesses that might (in today's "information society") otherwise gain, from a well-educated work force, an important commercial advantage . . . of a kind that location near a railhead or harbor provided in the past.

72. *Id.* at 874.

73. 115 S. Ct. 1624 (1995).

74. *Id.* at 1626.

75. *Id.*

76. *Id.* at 1659 (Breyer, J., dissenting) (quoting 18 U.S.C.A. §§ 922 (g)(1), (f)(6) (West Supp. 1994)).

77. *Id.* at 1658-59 (Breyer, J., dissenting).

Congress might also have found these threats to be no different in kind from other threats that this Court has found within the commerce power, such as the threat that loan sharking poses to the "funds" of "numerous localities," and that unfair labor practices pose to instrumentalities of commerce The violence-related facts, the educational facts, and the economic facts, taken together, make this conclusion rational.⁷⁸

However, such rationality is in the eye of the beholder. While reports and hearings may illustrate a link, a majority of the Court found it was unclear whether Congress intended a link when they passed the statute. Consequently, the Court found that the law in question went beyond the reach of the Commerce Clause. It is easy to point to many reports linking factors and claiming causation of a harm, but it is harder to claim that a network of research provided the intent for the entire Congress.⁷⁹

In *Allied-Bruce Terminix Companies, Inc. v. Dobson*,⁸⁰ Justice Breyer, writing for a six-justice majority, ruled that the Federal Arbitration Act was written broadly, thereby extending the Act's reach to the limits of Congress' Commerce Clause power.⁸¹ This case is a good example of how legislative history can be used to help expand the reach of a statute, perhaps beyond Congress' intended scope. Many states have passed statutes which invalidate pre-dispute arbitration agreements. The Alabama Supreme Court ruled that such clauses only apply if the parties contemplated substantial interstate activity at the time of contracting, thereby making it harder for contracting parties to enforce a prior agreement to resort to arbitration.⁸² The Supreme Court overruled that decision, stating the purpose of the Federal Arbitration Act was to overcome courts' refusals to enforce agreements to arbitrate.⁸³ The Federal Arbitration Act, section 2, provides that a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.⁸⁴

78. *Id.* (quoting *Perez v. United States*, 402 U.S. 146, 157 (1971)).

79. See *infra* Part II.B. for Justice Scalia's discussion of what actually constitutes "intent" of the legislature.

80. 115 S. Ct. 834 (1995).

81. *Id.* at 836.

82. *Allied-Bruce Terminix Co., Inc. v. Dobson*, 628 So. 2d 354, 357 (Ala. 1993).

83. *Allied-Bruce*, 115 S. Ct. at 837.

84. 9 U.S.C. § 2 (quoted in *Allied-Bruce*, 115 S. Ct. at 839).

The Court concluded that "involving" should be defined broadly and was the functional equivalent of "affecting."⁸⁵ Such a reading, according to Justice Breyer, is in line with the Congressional intent in 1924 when the statute was passed.⁸⁶

As examples of legislative history, Justice Breyer quoted statements from Congressmen.⁸⁷ Justice Breyer also quoted remarks made at Congressional hearings by individuals who were not legislators (the chairman of the Committee on Arbitration of the Chamber of Commerce of the State of New York and the drafter for the American Bar Association, whose language provided the basis for the federal bill) in order to demonstrate legislative intent.⁸⁸ Critics of the use of legislative history would point to such examples because private individuals are not elected and cannot demonstrate what 535 legislators believed the language of a bill to mean. At the very least, statements made by unelected officials should be viewed with caution.

Another case where Justice Breyer referenced legislative history was *Milwaukee Brewery Workers' Pension Plan v. Schlitz Brewing Co.*⁸⁹ That case dealt with the question of when interest begins to accrue after the withdrawal of a company from a pension plan under the Multi-employer Pension Plan Amendments Act (MPPAA).⁹⁰ The petitioner (the pension plan) used legislative history, among other arguments, to show the accrual date should be earlier because drafts of the legislation specifically contained the later date, the actual bill lacked such language.⁹¹ The inference was that Congress ultimately rejected the later date. Justice Breyer was forced to review the four different drafts of the bill in order to conclude that the absence of the language calling for the later date did not mean that Congress had changed its mind and opted for the earlier date. Instead, Justice Breyer stated that the legislative history and the evolution of the clause in question tended to point to the opposite conclusion.⁹²

More recently, Justice Breyer used legislative history in his concur-

85. *Allied-Bruce*, 115 S. Ct. at 839.

86. *Id.* at 839-40.

87. *Id.* at 839.

88. *Id.* at 840.

89. 115 S. Ct. 981 (1995).

90. *Id.* at 982.

91. *Id.* at 992.

92. *Id.*

rence⁹³ to *Morse v. Republican Party of Virginia*.⁹⁴ The issues in *Morse* centered on an interpretation of the Voting Rights Act of 1965.⁹⁵ The Republican Party of Virginia invited all registered Virginia voters to become delegates to a convention to nominate the Party's candidate for United States Senate upon payment of a registration fee.⁹⁶ The Appellants desired, and were qualified, to become delegates, but were rejected because they refused to pay the fee.⁹⁷ The Appellants brought suit, alleging that the imposition of the fee violated sections 5 and 10 of the Voting Rights Act of 1965.⁹⁸

While a number of complicated issues surrounded *Morse*, the main question was whether the coverage of section 5 encompassed the Party's voting qualifications and procedures when its nominees were chosen at a convention, *i.e.*, whether the Party at the convention acted under authority granted by the state of Virginia.⁹⁹ Justice Stevens cited a hearing record and floor statements from Representative Bingham, whose floor amendment expanded the scope of the Voting Rights Act, to illustrate the intention of Congress to expand the reach of the statute to cover political party activity like that in *Morse*.¹⁰⁰ In his concurrence, Justice Breyer built upon the majority opinion (stating that the term "State or political subdivision" encompassed political parties) and bolstered his argument by referring to legislative history.¹⁰¹ He mentioned the political conditions and the discrimination against African-Americans at the time the bill was debated.¹⁰² Justice Breyer noted that the case-by-case enforcement of the Fifteenth Amendment

93. Justice Stevens wrote the majority opinion which was joined by Justice Ginsburg. Justice Breyer wrote a concurrence which was joined by Justices O'Connor and Souter. Justice Scalia wrote a dissent which was joined by Justice Thomas. Justice Kennedy wrote a dissent which was joined by Chief Justice Rehnquist. Justice Thomas wrote a dissent which was joined by Chief Justice Rehnquist and Justice Scalia, and which was joined in part by Justice Kennedy.

94. 116 S. Ct. 1186, 1213 (1996) (Breyer, J., concurring).

95. Voting Rights Act of 1965, codified as amended at 42 U.S.C. § 1973c (1994).

96. *Id.* at 119.

97. *Morse*, 116 S. Ct. at 1191.

98. § 5 requires that a "State or political subdivision" get pre-clearance from the Attorney General for any new "voting qualification, or prerequisite to voting, or standard, practice, or procedure with respect to voting," in order to ensure that "such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 79 Stat. 439; 42 U.S.C. § 1973 (1994).

99. *Morse*, 116 S.Ct. at 1195.

100. *Id.* at 1200-01.

101. *Id.* at 1214 (Breyer, J., concurring).

102. *Id.*

was failing to adequately deal with various political maneuverings by southern political parties and that "[i]n 1965, to have read this Act as excluding all political party activity would have opened a loophole in the statute the size of a mountain."¹⁰³ Justice Breyer cited several quotes from Representative Bingham, both from his hearing testimony and floor statements, which clearly show that he intended the bill to include political party activity, thereby closing this loophole.¹⁰⁴

It is interesting to contrast Justice Breyer's use of legislative history in *Morse* to the statutory interpretation techniques used by Justices Scalia and Thomas. In his dissent, Justice Scalia argued that the issue of pre-clearance of political activity in this case "is not merely interpretation of [section] 5 of the Voting Rights Act, . . . but, inextricably bound up with that interpretation [is] the First Amendment freedom of political association."¹⁰⁵ Justice Scalia claimed that the statute is ambiguous at best, and noted the majority had "total disregard of the doctrine that, where ambiguity exists, statutes should be construed to avoid substantial constitutional questions."¹⁰⁶ He concluded that regardless of the legislative history, it was extremely doubtful "Congress would impose a restraint bearing a 'heavy presumption against its constitutional validity' in such a backhanded fashion—saying simply 'State[s]' and 'political subdivision[s]' in [section] 5, but meaning political parties as well."¹⁰⁷

In his dissent, Justice Thomas built upon Justice Scalia's argument. First, Justice Thomas argued that "[w]hen words in a statute are not otherwise defined," they "will be interpreted as taking their ordinary, contemporary, common meaning."¹⁰⁸ Justice Thomas maintained that "State" did not "encompass a partisan group such as the Republican Party of Virginia," and "political subdivision" referred to particular geographic regions within a state, such as New York's Westchester County.¹⁰⁹ Justice Thomas also relied upon the canon which states that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate

103. *Id.* at 1213 (Breyer, J., concurring).

104. *Id.* at 1214 (Breyer, J., concurring).

105. *Id.* at 1216 (Scalia, J., dissenting) (citation omitted).

106. *Id.* at 1218 (Scalia, J., dissenting).

107. *Id.* at 1219 (Scalia, J., dissenting) (quoting *Bantam Books Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

108. *Id.* at 1222-23 (Thomas, J., dissenting) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

109. *Id.* at 1223 (Thomas, J., dissenting).

inclusion or exclusion.”¹¹⁰ He noted that Congress used broader language in section 11 of the Act (“[n]o person *acting under color of law* . . .”), but failed to be so specific in section 5 of the Act.¹¹¹

Justice Thomas dismissed the statements by Representative Bingham as unnecessary legislative history:

[V]oting does extend to casting a ballot for a party officer, but only when that ballot is cast at a primary, special, or general election. Since this is obvious on the face of the statute, I see no need to resort to the legislative history of the Bingham Amendment. Though Representative Bingham may have had every intention of covering the activities of political parties under [section] 5, there is no evidence that he succeeded in transforming that intention into law.¹¹²

Typically, textualists focus on what the text actually says and not what some of its sponsors intended it to mean, as can be seen below in the discussion of the views of Justice Scalia. Justice Thomas specifically reproves Justice Breyer for the logical inference in his concurrence which stems from the legislative history.¹¹³

110. *Id.* at 1228 (Thomas, J., dissenting) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

111. *Id.* at 1228-29 (Thomas, J., dissenting). Justice Thomas drew a comparison between the language in § 11 and the language in 42 U.S.C. § 1983 where the state action doctrine was incorporated. *Id.* He argued that if Congress intended to incorporate the state action doctrine in § 5 as well, it should have used similar language. *Id.* at 1228-29.

112. *Id.* at 1236 (Thomas, J., dissenting) (citations omitted).

113. *Id.* at 1234 n.18 (Thomas, J., dissenting). Justice Thomas stated:

Indeed, Justice Breyer's concurring opinion is founded on little more than sheer disbelief that Congress passed a statute that does not go as far in terms of coverage as he thinks, in light of the history of voting rights, the statute should . . . We are not free to construe statutes by wondering about what Congress "would have wanted to enact." There are myriad reasons why measures that "a Congress"—I assume Justice Breyer means a majority of the members of that institution—might 'wan[t] to enact' never become law. We must look to the extant text of the statute and see what Congress has in fact, and not in theory, enacted.

In contrast to Justice Breyer's imaginary statute, which covers all actors that might discriminate in the electoral process, § 5 is in reality limited to States and political subdivisions . . . Justice Breyer's argument thus boils down to the curious notion that when Congress passes a statute that covers certain actors, it thereby establishes a 'loophole' for all other . . . I presume [Congress] was also cognizant of the prohibitions of the First Amendment, as well as the constraints on its legislative powers under the Fifteenth Amendment, not the least of which is the state action requirement. Both of these *constitutional* limits on Congress' powers are sufficient reason to curb speculation and to think it 'possible' (if the lack of textual evidence were not enough) that Congress did not intend to cover political parties under § 5.

Id. at 1234 n.18 (Thomas, J., dissenting).

One other case involving statutory interpretation and legislative history for which Justice Breyer wrote an opinion is *Varity Corp. v. Howe*.¹¹⁴ This case provides another effective illustration of the differences between Justice Breyer's techniques and those of the textualists on the Court. The plaintiffs in *Varity Corp.* were employees and retirees who brought an action under the Employee Retirement Income Security Act (ERISA) against their corporate employer for harming the plaintiffs through deliberate deception while acting as fiduciaries.¹¹⁵ Justice Breyer determined a number of terms used in ERISA were ambiguous and turned to the legislative history for guidance. The legislative history expressly stated "[r]ather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility."¹¹⁶ In each of the three questions before the court, Justice Breyer looked to the legislative history and then to the common law of trusts to find that (1) the employer was acting as an ERISA fiduciary when it misled employees regarding security of their benefits if they transferred, (2) the employer violated fiduciary obligations of ERISA in misleading employees, and (3) ERISA authorized lawsuits for individualized equitable relief.¹¹⁷

In a typical textualist dissent, Justice Thomas, joined by Justices Scalia and O'Connor, criticized the majority for looking past the plain meaning of the statute.¹¹⁸ Justice Thomas used canons of interpretation¹¹⁹ and the dictionary¹²⁰ to find meaning in the relevant sections

114. 116 S. Ct. 1065 (1996).

115. *Varity*, 116 S. Ct. at 1068.

116. *Id.* at 1070; H.R. Rep. No. 93-533, pp. 3-5, 11-13 (1973) (quoting *Central States Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985)).

117. *Id.* at 1070-79.

118. *See id.* at 1079 (Thomas, J., dissenting).

119. The first canon Justice Thomas used was:

[I]t is a commonplace of statutory construction that the specific governs the general. The law is settled that however inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment. This is particularly true where, as here, Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.

Id. at 1081 (Thomas, J. dissenting).

Justice Thomas also relied upon a second canon: "the Court violates yet another well-settled rule of statutory construction, namely that 'courts should disfavor interpretations of statutes that render language superfluous.'" *Id.* at 1082 (Thomas, J., dissenting) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992)).

120. *Id.* at 1086 (Thomas, J., dissenting).

of ERISA, and while not criticizing the majority for using legislative history, Justice Thomas chose not to review it. He did, however, criticize Justice Breyer's opinion for leaving the text of the statute too soon:

[t]hough we have recognized that Congress borrowed from the common law of trusts in enacting ERISA we must not forget that ERISA is a statute, and in "every case involving construction of a statute," the "starting point . . . is the language itself." We should be particularly careful to abide by the statutory text in this case, since, as explained, ERISA's statutory definition of a fiduciary departs from the common law in an important respect. The majority, however, tells us that the "starting point" in determining fiduciary status under ERISA is the common law of trusts. According to the majority, it is only "after" courts assess the common law that they may "go on" to consider the statutory definition, and even then the statutory inquiry is only "to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements." This is a novel approach to statutory construction, one that stands our traditional approach on its head.¹²¹

Justice Breyer responded by criticizing both the dissent's use of a dictionary and interpretive canons: "Though dictionaries sometimes help in such matters, we believe it more important here to look to the common law, which, over the years, has given to terms such as 'fiduciary' and trust 'administration' a legal meaning to which, we normally presume, Congress meant to refer."¹²² Justice Breyer's dismissal of the use of canons follows the reasoning in his journal article defending the use of legislative history.¹²³

Canons of construction, however, are simply "rules of thumb" which will sometimes "help courts determine the meaning of legislation." To apply a canon properly one must understand its rationale. This Court has understood the present canon ("the specific governs the general") as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision.¹²⁴

Justice Breyer found no evidence that Congress intended the specific remedies in ERISA as limitations, rather than as possibilities.¹²⁵

121. *Id.* at 1085 (Thomas, J., dissenting) (citations omitted).

122. *Varity Corp.*, 116 S. Ct. at 1072-73.

123. *See infra* Part II.A.

124. *Varity Corp.*, 116 S. Ct. at 1077 (citations omitted).

125. *Id.* at 1077-78.

While other justices have defended the use of legislative history, Justice Breyer is seen as having the greater role of acting as the new counterweight to Justice Scalia's textualism. Justice Breyer stands for the status quo or the conventional view of the use of legislative history. His conventional view will increasingly be challenged by the new textualists.

B. Justice Scalia's Views

By speaking out on the issue in 1987 and acting accordingly once he joined the Court, Justice Scalia sparked the resurgence of the plain meaning rule and the rejection of the use of legislative history. After joining the Supreme Court he set a pattern of refusing to join in opinions which relied upon legislative history, instead choosing to write his own concurrences. Distrustful of legislative history, Justice Scalia borrowed the metaphor of Judge Harold Levanthal to describe the use of legislative history as "[t]he equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends."¹²⁶

Justice Scalia has been joined by Justice Thomas, and to a great degree Justice Kennedy, in a general rejection of the use of legislative history.¹²⁷ Chief Justice Rehnquist and Justice O'Connor frequently join Justice Scalia's opinions, but seldom rely on his approach in their own opinions. The remaining four justices welcome the use of legislative history. Justice Scalia has not written a definitive exposition on his views of legislative history, but he has presented many pieces of his views in various Supreme Court decisions. He finds a number of problems with using legislative history. First, legislative history lacks legitimacy as it is not the law itself.¹²⁸ Second, even if legislative history were legitimate, it is often prohibitively difficult to find a single true legislative intent by studying the records.¹²⁹ Finally, even if one could find such an intent, legislative history is easily susceptible to manipulation by staff and lobbyists, and therefore it is untrustworthy.¹³⁰

According to Justice Scalia, the biggest problem with legislative

126. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

127. See, e.g., *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (Thomas, J., dissenting) (citing Plain Meaning Rule as a "cardinal canon" in statutory interpretation); *Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661, 679 (1990) (Kennedy, J., dissenting) (criticizing the Court for departing from plain meaning in interpreting statute exempting certain medical devices from patent infringement claims).

128. *Conroy*, 507 U.S. at 519 (Scalia, J., concurring).

129. *Id.*

130. *Blanchard v. Bergeron*, 489 U.S. 87, 98 (Scalia, J., concurring).

history remains its lack of legitimacy.¹³¹ Scalia said it clearly in *Conroy v. Aniskoff*, "[t]he greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislatures."¹³² It is the language of the statute itself which is the law. "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."¹³³ Justice Scalia finds judges too often go beyond what is in the statute and ultimately enact the legislative history into law. The problem is that legislative history has neither been debated nor voted on by the legislature nor signed into law by the executive.

Scalia agrees that the Court should enforce the intentions of the legislature, but he disagrees over what should be done to enact those intentions. In *Pennsylvania v. Union Gas Co.*,¹³⁴ Scalia stated:

It is our task, as I see it, not to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective—but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times.¹³⁵

To give credence to the statements of individual legislators circumvents the entire legislative process: "An enactment by implication cannot realistically be regarded as the product of the difficult lawmaking process our Constitution has prescribed. Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral votes upon the text of a law and its presentment to the President."¹³⁶

Justices have sometimes gone beyond those types of legislative history traditionally consulted to create "enactment by implication." In her review of the use of legislative history during the 1981 Supreme Court term, Patricia Wald listed several examples of how members of the Court have drifted toward using unusual sources of legislative history.¹³⁷ In Justice Powell's dissent in *Merrill Lynch, Pierce, Fenner &*

131. *Conroy*, 507 U.S. at 519 (Scalia, J., concurring)

132. *Id.*

133. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring).

134. 491 U.S. 1 (1989) (Scalia, J., concurring in part and dissenting in part).

135. *Pennsylvania*, 491 U.S. at 30; *but see Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996).

136. *Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring) (citations omitted).

137. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983).

Smith, Inc. v. Curran,¹³⁸ he wrote that "the only 'unambiguous evidence of Congress' intent" was a chart prepared by the "expert committee staff" and used to advise the legislators."¹³⁹ The majority in *American Tobacco Co. v. Patterson* cited Justice Department memoranda and interpretative memoranda by two senators.¹⁴⁰ The majority in *American Tobacco Co.* "also cited statements by one senator known to be 'technically incorrect' but deemed appropriate to show the thrust of the bill," and cited "remarks about the bill that were made before the amendment at issue was even introduced," based "on the theory that, because its sponsor said [the amendment] did not alter the meaning of the bill, anything said about the bill earlier was also valid evidence of the meaning of the amendment."¹⁴¹ The Court even found relevance in the amount of time it took to consider legislation. In *American Tobacco Co.* the Court noted the "months of labor" in drafting the bill,¹⁴² and in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Court pointed out that the bill finally enacted "was the result of a series of last-minute conferences."¹⁴³ Such examples, from just one Supreme Court term, demonstrate that when courts begin to consult legislative history they go too far in order to find meaning.

Even if one were to accept that legislative history is a legitimate source to determine the intent of the legislature, Justice Scalia argues that such an exercise can cause more problems than it solves: "[N]ot the least of the defects of legislative history is its indeterminacy. If one were to search for an interpretive technique that, *on the whole*, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history."¹⁴⁴

This confusion is increased, in part, due to the difficult task of finding a proper limit to the scope of inquiry into legislative history in some cases. One example can be found in *Conroy v. Aniskoff*,¹⁴⁵ where the Supreme Court interpreted the Soldiers' and Sailors' Civil Relief Act to find that a member of the armed services need not show that his or her

138. 102 S. Ct. 1825 (1982).

139. Wald, *supra* note, 137, at 204 (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 102 S.Ct. 1825, 1854 (1982) (Powell, J., dissenting)).

140. *Id.* at 204 n.74 (summarizing *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71-73 & n.15 (1982)).

141. *Id.*

142. *American Tobacco Co.*, 456 U.S. at 68. See also Wald, *supra* note 137, at 204 n.74.

143. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 61 n.12 (1982).

144. *Conroy*, 507 U.S. at 519 (Scalia, J., concurring).

145. 507 U.S. 111 (1993).

military service prejudiced his or her ability to redeem title to his property before he or she could qualify for suspension of time to redeem under that Act.¹⁴⁶ In *Conroy*, an Army officer, who had been on active duty, but not at war, failed to pay local property taxes for three years and lost his home acquired to the town.¹⁴⁷

The majority based its decision on four pieces of legislation: 1) The Soldiers' and Sailors' Civil Relief Act of 1918 ("1918 Act");¹⁴⁸ 2) the Soldiers' and Sailors' Civil Relief Act of 1940 ("1940 Act");¹⁴⁹ 3) The Soldiers' and Sailors' Civil Relief Act Amendments of 1942;¹⁵⁰ and 4) the Selective Service Act of 1948.¹⁵¹ Justice Scalia concurred in the judgment because of the plain meaning of the statute, but reviewed the legislative history to demonstrate that the majority had misinterpreted Congressional intent and that the majority claim had contradicted the plain meaning of the statute. In his concurrence, Justice Scalia pointed out that legislative history is inherently "open-ended."¹⁵² Justice Scalia stated in *Conroy* that

one could go back further in time to examine the Civil War-era relief Acts, many of which are in fact set forth in an appendix to the House Report on the 1918 Act Or one could extend the search abroad and consider the various foreign statutes that were mentioned in that same House Report. Those additional statutes might be of questionable relevance, but then so too are the 1918 Act and the 1940 Act, neither of which contained a provision governing redemption periods.¹⁵³

His point is that, in many cases, ending legislative history research is merely an arbitrary decision that itself has no particular rhyme or reason, but might still have a significant effect on the final decision.

Justice Scalia also argues that judges can create an intent for the legislature where none truly existed:

[T]he quest for the "genuine" legislative intent is probably a wild-goose chase anyway. In the vast majority of cases I expect that Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon [an administrative] agency, but rather (3) didn't think about the matter at all. If I am correct in that,

146. *Id.* at 511-18.

147. *Id.*

148. 40 Stat. 440 (1918).

149. 54 Stat. 1178 (1940).

150. 56 Stat. 769 (1942).

151. 62 Stat. 604 (1948).

152. *Conroy*, 507 U.S. at 520 (Scalia, J., concurring).

153. *Id.* at 520 (Scalia, J., concurring) (citations omitted).

then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.¹⁵⁴

Justice Scalia also has a unique definition of legislative intent. He does not regard legislative intent to be what the legislature wanted the language to mean *per se*, but rather what the legislature understood the language to mean. This requires a judge to look at all of the surrounding law:

The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated — a compatibility which, by a benign fiction, we assume Congress always has in mind.¹⁵⁵

To this end, Justice Scalia has specifically criticized the use of committee reports, which is the most commonly referenced type of legislative history. “[W]e are a Government of laws not of committee reports”,¹⁵⁶ committee reports are “unreliable” as “a genuine indicator of congressional intent,”¹⁵⁷ and they d[o] not necessarily say anything about what Congress as a whole thought [W]e have no way of knowing that they had any *rational* motive at all.”¹⁵⁸

It is also generally known that legislators have little or no involvement in writing committee reports. Justice Scalia made this strikingly clear when he sat on the D.C. Circuit Court of Appeals by citing the exchange between Senators Dole and Armstrong, a passage which is now famous among those who study the use of legislative history.¹⁵⁹

154. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

155. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

156. *Id.* at 2490.

157. *Id.*

158. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 621 (1991) (Scalia, J., concurring).

159. *Hirschey v. FERC*, 777 F.2d 1, 7-8 n.1 (D.C. Cir. 1985). Justice Scalia quoted the following text as an “illuminating exchange . . . between members of the Senate, in the course of floor debate on a tax bill”:

MR. ARMSTRONG: . . . My question, which may take [the chairman of the Committee on Finance] by surprise, is this: Is it the intention of the chairman that

Often when committee reports are quoted, the entire meaning of a statute is drawn from such quotes. Justice Scalia argues that this places too much reliance upon a few quotes. It is not "conducive to a genuine effectuation of congressional intent" to "give legislative force to each snippet of analysis" contained in legislative history.¹⁶⁰

Even if judges could routinely gain knowledge from legislative history, Justice Scalia argues that such history is easily and frequently manipulated by the judicial branch: "We use [committee reports] when it is convenient, and ignore them when it is not,"¹⁶¹ and it is "dangerous to assume that, even with the utmost self-discipline, judges can prevent the implications they see from mirroring the policies they favor"

the Internal Revenue Service and the Tax Court and other courts take guidance as to the intention of Congress from the committee report which accompanies this bill?

MR. DOLE: I would certainly hope so

MR. ARMSTRONG: Mr. President, will the Senator tell me whether or not he wrote the committee report?

MR. DOLE: Did I write the committee report?

MR. ARMSTRONG: Yes.

MR. DOLE: No; the Senator from Kansas did not write the committee report.

MR. ARMSTRONG: Did any Senator write the committee report?

MR. DOLE: I have to check.

MR. ARMSTRONG: Does the Senator know of any Senator who wrote the committee report?

MR. DOLE: I might be able identify one, but I would have to search. I was here all during the time it was written, I might say, and worked carefully with the staff as they worked

MR. ARMSTRONG: Mr. President, has the Senator from Kansas, the chairman of the Finance Committee, read the committee report in its entirety?

MR. DOLE: I am working on it. It is not a bestseller, but I am working on it.

MR. ARMSTRONG: Mr. President, did members of the Finance Committee vote on the committee report?

MR. DOLE: No.

MR. ARMSTRONG: Mr. President, the reason I raise the issues is not perhaps apparent on the surface, and let me just state it: The report itself is not considered by the Committee on Finance. It was not subject to amendment by the Committee on Finance. It is not subject to amendment now by the Senate If there were matter within this report which was disagreed to by the Senator from Colorado or even by a majority of all Senators, there would be no way for us to change the report. I could not offer an amendment tonight to amend the committee report

[F]or any jurist, administrator, bureaucrat, tax practitioner, or others who might chance upon the written record of this proceeding, let me just make the point that this is not the law, it was not voted on, it is not subject to amendment, and we should discipline ourselves to the task of expressing congressional intent in the statute.

128 CONG. REC. 8659 (daily ed. July 19, 1982).

160. *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring).

161. *Wisconsin Pub. Intervenor*, 501 U.S. at 617 (Scalia, J., concurring).

when relying on legislative history.¹⁶² An extreme example is seen in *Blanchard v. Bergeron*,¹⁶³ a case that involved whether the amount awarded to a plaintiff for attorney's fees could be limited by prior contingency fee arrangements.¹⁶⁴ In finding that the arrangements did not limit such awards, the majority referenced committee reports which made fine distinctions between conflicting cases decided by lower courts—stating that one court's statement was dicta while other courts' statements were actual holdings.¹⁶⁵ Justice Scalia attacked such reasoning with dripping sarcasm in his concurrence:

I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question, even if (as is not always the case) the Reports happened to have been published before the vote; that very few of those who did read them set off for the nearest law library to check out what was actually said in the four cases at issue (or the more than 50 other cases cited by the House and Senate Reports); and that *no* Member of Congress came to the judgment that the District Court cases would trump *Johnson* on the point at issue here because the latter was dictum.¹⁶⁶

Justice Scalia pointed out that most language in reports is inserted by committee staff members—either on their own initiative or at the request of a lobbyist.¹⁶⁷ “What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land.”¹⁶⁸ Another case where Justice Scalia pointed to abuse of legislative history is *Chisom v. Roemer*.¹⁶⁹ In *Chisom*, the Court debated whether elected judges are considered “representatives” for the purposes of the Voting Rights Act.¹⁷⁰ Petitioners from Louisiana argued that the unique voting scheme in that state provided African-Americans, members of a protected class, with “less opportunity than other members of the electorate to participate in the political process and to elect representa-

162. *Thompson*, 484 U.S. at 192 (Scalia, J., concurring).

163. 489 U.S. 87, 90 (1989).

164. *Id.* at 90.

165. *Id.* at 92-93.

166. *Id.* at 98 (Scalia, J., concurring).

167. *Id.*

168. *Id.* at 99 (Scalia, J., concurring).

169. 501 U.S. 380 (1991).

170. *Id.* at 383-84.

tives of their choice.”¹⁷¹ The majority defined “representative” as one who wins a popular election and pointed to legislative history to show that judges are not expressly excluded from coverage under the statute.¹⁷² Justice Scalia strongly criticized the majority for starting the case with an expectation of what the statute means and then finding legislative history and a counterintuitive definition to support that expectation.¹⁷³ The term “representative” might mean judge, but that is not the ordinary meaning of the word:

[O]ur job is not to scavenge the world of English usage to discover whether there is any possible meaning of “representatives” which suits our preconception that the statute includes judges; our job is to determine whether the *ordinary* meaning includes them, and if it does not, to ask whether there is any solid indication in the text or structure of the statute that something other than the ordinary meaning was intended.¹⁷⁴

Justice Scalia goes on to argue that a representative connotes one who is not only elected by the people, but who also, at the minimum, acts on behalf of the people.¹⁷⁵ Judges do not represent the people in the ordinary sense, argued Justice Scalia, as that is done by the prosecutor.¹⁷⁶ Thus, the majority was able to ignore contrary legislative history in order to support their preconceived outcome.

Ironically, Justice Scalia has also been guilty of selective reading of legislative history. Justice Scalia consulted legislative history in *Edwards v. Aguillard*¹⁷⁷ to show that the Louisiana legislature had a legitimate “secular purpose” in enacting a statute that required the teaching of creation science in the public schools.¹⁷⁸ Justice Scalia wrote “[t]he legislative history gives ample evidence of the sincerity of the Balanced Treatment Act’s articulated [secular] purpose.”¹⁷⁹ However, it was believed by many that the legislative history was intentionally kept clean of any references to a religious purpose. Justice Scalia was manipulated by the legislative history himself, just as he warned that judges may be manipulated.

171. *Id.* at 388 (quoting League of United Latin American Citizens Council No. 4434 v. Clements, 914 F.2d 620, 625 (1990)).

172. *Id.* at 391-94.

173. *Id.* at 405 (Scalia, J., dissenting).

174. *Id.* at 410 (Scalia, J., dissenting).

175. *Id.*

176. *Id.* at 410-11.

177. 482 U.S. 578 (1987) (Scalia, J., dissenting).

178. *Id.* at 631.

179. *Id.*

Justice Scalia maintains that even if one learns the intent of the legislature by consulting the legislative history, this does not prove the usefulness of such an exercise:

It should not be thought that, simply because adverting to the legislative history produces the same result we would reach anyway, no harm is done We should not make the equivalency between making legislative history and making an amendment [to the statutory text] plausible. It should not be possible, or at least should not be easy, to be sure of obtaining a particular result in this Court without making that result apparent on the face of the bill which both Houses consider and vote upon, which the President approves, and which, if it becomes the law, the people must obey. I think we have an obligation to conduct our exegesis in a fashion which fosters that democratic process.¹⁸⁰

Members of Congress have been known to avoid the amendment process in favor of using legislative history instead. Justice Scalia pointed this out in *U.S. v. Taylor*,¹⁸¹ where the majority alluded to floor debate containing the following quote: "Mr. Dennis . . . I have an amendment here in my hand which could be offered, but if we can make up some legislative history which would do the same thing, I am willing to do it."¹⁸²

Such a practice is misleading enough when spoken on the floor of the House of Representatives or the Senate. The practice is significantly more misleading when members of Congress are able to place statements in the record without having to speak in front of the entire chamber. Such statements can go unnoticed by other members and staff and can serve to mislead judges who are not familiar with congressional operations.

Legislators and their staff can easily plant faulty legislative history, and in fact they do. In a criticism of extensive use of legislative history, Senator Orrin Hatch, now Chairman of the Senate Judiciary Committee, stated that "[e]very legislative staff member wants to write a speech or report that determines the outcome of a future case."¹⁸³ To provide an example of what can happen in Congress, Senator Hatch presented the

180. *United States v. Taylor*, 487 U.S. 326, 345-46 (1988) (Scalia, J., concurring).

181. *Id.*

182. *Id.* at 345 (quoting 120 CONG. REC. 41795 (1974)).

183. Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J. L. & PUB. POL'Y 43, 44 (1988). While Senator Hatch criticized the use of legislative history, he did condone its careful use. "Authoritative legislative history can serve to focus the general words of a statute to the specific harms it is meant to correct. In this sense, legislative history is an integral part of the lawmaking process." *Id.* at 47.

case of *NLRB v. Bildisco & Bildisco*¹⁸⁴ and the subsequent action in Congress. The Supreme Court in *Bildisco* decided that a collective bargaining agreement may be unenforceable when a business files for bankruptcy.¹⁸⁵ In subsequent legislation "[t]here was a general agreement in Congress for compromise legislation that would preserve *Bildisco* when necessary to protect creditors, and overrule the case when necessary to prevent the use of artificial bankruptcies to avoid a union contract."¹⁸⁶ Ultimately Congress came to a consensus and passed legislation. However, one senator who did not like the compromise introduced into the Congressional Record

a lengthy brief explaining that the new standard completely overturned *Bildisco*, something that everyone agreed was not the intention of Congress It was a lengthy legalistic presentation complete with citations delivered by one member of the Senate on a matter upon which no other senator had ventured to comment. This speech was simply dropped into the record; the senator who had it placed there knew that if he had introduced it into the debate a number of us would have stood up and stated that the insertion was incorrect. Clearly, then, this was an attempt to influence future cases. At best, it was the view of one member and not the view of the entire Congress. At worst, it was the unreviewed opinion of an unelected senate staff member, probably composed with the help of a number of very shrewd union intellectuals.¹⁸⁷

It is clear that legislators, staff and private lobbyists will try to skew the public record by planting such remarks in the legislative history. Judges who are not as familiar with legislative games like this one might easily be persuaded by faulty legislative history.¹⁸⁸

184. 465 U.S. 513 (1984).

185. *Id.* at 516-17.

186. Hatch, *supra* note 183, at 44.

187. *Id.* at 44-45.

188. Some judges have been wary of such "invented" legislative history created by staff and legislators. Judge Kozinski on the 9th Circuit Court stated that "[t]he propensity of judges to look past the statutory language is well known to legislators. It creates strong incentives for manipulating legislative history to achieve through the court results not achievable during the enactment process. The potential for abuse is great." *Wallace v. Christensen*, 802 F.2d 1539, 1559 (9th Cir. 1986) (Kozinski, J., concurring). See also Mayton, *supra* note 2, at 113, n.5; *National Small Shipments Traffic Conference, Inc. v. Civil Aeronautics Board*, 618 F.2d 819, 828 (D.C. Cir. 1980) ("[I]nterest groups who fail to persuade a majority of the Congress to accept particular statutory language often are able to have inserted in the legislative history of the statute statements favorable to their position, in the hope that they can persuade a court to construe the statutory language in light of these statements.").

However, Justice Scalia does not strictly adhere to his own rule against using legislative history, as he envisions cases where legislative history can actually be useful. Scalia does allow judges to consult legislative history in order to avoid an absurd result:

[I] think it entirely appropriate to consult all public materials, including the background of Rule [of Evidence] 609(a)(1) and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition . . . was indeed unthought of, and thus to justify a departure from the ordinary meaning of the word "defendant."¹⁸⁹

While it may be true that legislative history could help a court avoid an absurd result, there is nothing to prevent that legislative history from being misleading as Justice Scalia warns.

Rather than relying upon legislative history, Justice Scalia prescribes his own brand of textualism. He endorses a two step method which uses ordinary meaning and canons of interpretation to find the meaning of the language:

[F]irst, find the ordinary meaning of the language in its textual context; and second, using established canons of statutory construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning.¹⁹⁰

Justice Scalia allows for the consideration of policy as well:

[T]he "traditional tools of statutory construction" include not merely text and legislative history but also, quite specifically, the consideration of policy consequences Surely one of the most frequent justifications courts give for choosing a particular construction is that the alternative interpretation would produce "absurd" results, or results less compatible with the reason and purpose of the statute. This, it seems to me, unquestionably involves judicial consideration and evaluation of competing policies . . . to determine which one will best effectuate the statutory purpose. Policy evaluation is, in other words, part of the traditional judicial tool-kit . . . the step that determines . . . whether the law is indeed ambiguous.¹⁹¹

While only Justices Scalia, Thomas and Kennedy reject legislative

189. *Green*, 490 U.S. at 527 (Scalia, J., concurring).

190. *Chisom*, 501 U.S. at 404 (Scalia, J., dissenting).

191. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515.

history, their behavior has affected Supreme Court opinions as a whole. Even justices that support the use of legislative history often have refrained from mentioning it in order to form coalitions and get a majority of votes for their decisions.

Building upon statistics from earlier research, Professor Thomas Merrill of the Northwestern University School of Law published the following chart to demonstrate there is a definite trend on the Supreme Court away from using legislative history.¹⁹²

Textualism in the Supreme Court, 1981-1992

Term	Total Statutory Interpretation Cases	Cases Making Substantive Use of Legislative History	Cases Not Mentioning Legislative History	Cases Relying on Dictionaries
1981	69	69 (100%)	0 (0%)	1 (1%)
1988	71	53 (75%)	10 (14%)	9 (13%)
1992	66	12 (18%)	41 (62%)	22 (33%)

While most Supreme Court justices avidly defend the use of legislative history, there has been a very significant drop not only in the use of legislative history, but also the substantive use of legislative history. While the use of dictionaries cannot be directly equated with adherence to textualism, it is an important tool used in textualism and the increase in use of dictionary definitions by the Supreme Court indicates a trend toward textualism in recent years. Therefore, having only two or three textualists on a court can have a tremendous effect on how the Court as a whole uses legislative history.

IV. THE FORMALIST ARGUMENT FOR TEXTUALISM

The risk that judges use legislative history improperly and arrive at an incorrect result is just one danger in using legislative history. The other danger is that courts will use legislative history to improperly usurp power from both the legislative and executive branches. The primary

192. Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 355 (1994). See also Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990).

concern is maintaining the power of the legislative branch, but the executive branch is often involved in the political machinations which create legislation, and, therefore, also has a stake in whatever compromise is enacted. This formalist argument is grounded in democratic theory, but can also be seen theoretically in the light of general contract law—with the enacted legislation acting as the “contract” between the political factions.

The statutes which come from the legislative branch are often the product of extensive and detailed negotiations. Multiple compromises are built into any statute and this creates a fragile agreement over the language.¹⁹³

In studying a statute for its meaning (and the compromises), it is important to remember that the legislative branch of government is also a political branch. Members of Congress “will put the privileges and facilities of their respective chambers to political as well as legislative uses.”¹⁹⁴ Legislative history presents the danger of introducing the supposedly non-political courts into the political process of legislation.¹⁹⁵ The judicial branch is not supposed to make their decisions using political considerations or entangle itself in political controversies.¹⁹⁶ Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, wrote:

I will let you in on an obvious secret. Statements by a single senator that are not the subject of debate are often included in the record to satisfy a constituent who was not happy with the outcome of the law. Politics often demands these gestures, but they are not a meaningful part of the legislative process. This means senators will make political, as well as legislative, speeches. Unfortunately, a judge could potentially seize upon that unreliable comment in the Congressional Record to arrive at a preconceived result.¹⁹⁷

Courts have to remember that not every utterance found in committee reports or the Congressional Record may be assumed to

193. See Hatch, *supra* note 183.

194. *International Brotherhood of Electrical Workers, Local Union No. 474 v. NLRB*, 814 F.2d 697, 715 (D.C. Cir. 1987) (Buckley, J., concurring).

195. Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 Duke L.J. 371, 376.

196. William T. Mayton, *Law Among The Pleonasms: The Futility and Aconstitutionality of Legislative History in Statutory Interpretation*, 41 EMORY L.J. 113, 138 (1992) (citing *Schwegmann Bros. v. Calvery Distillers Corp.*, 341 U.S. 384, 396 (1951) (Jackson, J., concurring)).

197. Hatch, *supra* note 183, at 45.

represent "statutory gold."¹⁹⁸ Even judges, confined to the printed page and lacking knowledge of the inner workings of the legislature, who want to find the proper result may not always be able to "separate legislative wheat from political chaff" and discard the remarks meant only for certain political constituencies.¹⁹⁹

Comments made for political purposes are not the only problem encountered when deciphering the statutory compromises from legislative history. Another problem is that the sources themselves are limited in scope of vision. Judges like to refer primarily to committee reports to find the intent of Congress. Then U.S. Court of Appeals Judge Kenneth Starr pointed out that:

[t]hese records, however, at best can shed light only on the "intent" of that small portion of Congress in which such records originate; they therefore lack the holistic "intent" found in the statute itself. Thus, although congressional committees are reservoirs of expertise and technical knowledge, by the same token committees may be narrow and parochial in their outlook, less balanced on the subject in question than the Congress as a whole.²⁰⁰

Judges who want to accurately find the "intent" of Congress would still be misled by such materials.

Judge Starr stated, "[l]egislative history, however, has the potential to mute (or indeed override) the voice of the statute itself. In terms of democratic theory, the use of legislative history can distort the proper voice of each branch of our constitutional government."²⁰¹ With legislative history, courts are able to overpower the plain meaning of a statute in the name of the original intent of the legislature. One such method is to seek out a broad policy goal embodied in the legislative history and use that broad goal to give detailed meaning to specific clauses, even when the language does not support such a meaning.²⁰²

198. *International Brotherhood*, 814 F.2d at 715 (Buckley, J., concurring).

199. *Id.* at 717 (Buckley, J. concurring).

200. Starr, *supra*, 195, at 375.

201. *Id.* at 375.

202. Such concern was expressed by Judge Starr in *Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency* where he answered the EPA's broad policy based interpretation by writing:

It would be illegitimate for the judiciary, in pursuit of some overriding Congressional goal (such as eliminating water pollution), to tear asunder a specific provision which Congress saw fit to enact. It scarcely needs repeating that statutes are rarely, if ever, unidimensionally directed towards achieving or vindicating a single public policy.

Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency,

Another tactic legislative history allows for is to read earlier statutes as if they had been enacted by recent congresses.²⁰³ Judge Easterbrook criticized this technique in his dissent in *Marozsan v. United States*:

The technique starts by putting a hypothetical question to the minds of deceased legislators who never thought about it while they were living—let alone while they were in Congress assembled. These ghostly legislators always give the answer the questioner prefers; they are in no position to do otherwise. Their “answer” becomes the basis for insisting that the statute they actually wrote be construed consistently with the views we have put in their mouths—for they did not deny that they wanted the statute construed consistently with the answer they did not give! Yet the fact that they did not answer a question that was not asked of them does not grant us the authority to disregard the answer they gave to the question that was asked.²⁰⁴

Judge Easterbrook has pointed out that this method is inherently biased:²⁰⁵ “First, the court may choose when to declare the language of the statute ‘ambiguous’ Second, the court may choose the hypothetical question to put to the legislative body. Third, the court has endless flexibility in selecting *who* is asked the question.”²⁰⁶ Rather than asking a median legislator, courts invariably put the hypothetical question to the most fervent supporters of a particular position.²⁰⁷ Judge Easterbrook argues that the very novelty of a question suggests the legislature did not answer it, and, therefore, legislative history should not be of any assistance.²⁰⁸

By relying upon legislative history, judges alone are able to override the democratic machinations of the legislature which has cut out a compromise after long and hard debate. This elevates language that has not been passed by the entire legislative body to take on disproportionately important meaning. Justice Scalia is not the only one to attack the use of legislative history for its lack of legitimacy.²⁰⁹ Judge Easterbrook maintains that the process of legislation was the most important

822 F.2d 104, 113 (D.C. Cir. 1987).

203. See *Marozsan v. United States*, 852 F.2d 1469 (7th Cir. 1988).

204. *Id.* at 1498 (Easterbrook, J., dissenting).

205. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL'Y 59 (1988).

206. *Id.* at 62-63.

207. *Id.* at 63.

208. *Id.* at 66.

209. See *supra* Part II.B.

achievement of the Constitution.²¹⁰ James Madison said in Federalist No. 10 that the cumbersome process of legislation is the best safeguard against error; a process through which people wrestled for power in a Republic with many loci of power was, he thought, the best way to tease public spirit out of self-interested voters.²¹¹ Finding the intent of the legislature in legislative history, rather than in the words of the statute, circumvents the entire process designed to safeguard the democratic process. Justice Frankfurter made this point eloquently when he said, "no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature."²¹²

So how should legislative history be used, if at all? It is important to remember that, as Judge Easterbrook maintains, "[s]tatutes are law, not evidence of law."²¹³ Justice Holmes stated this years ago: "[w]e do not inquire what the legislature meant; we ask only what the statute means."²¹⁴ This is essentially the Scalia view.²¹⁵

Legislative history can be helpful to discover the meaning of particular words in a statute, but it should not be used to find the intent of a statute. Put another way, "[t]he process is objective; the search is not for the contents of the authors' heads but for the rules of language they used."²¹⁶ Judge Easterbrook spelled out at length when and why legislative history can be useful in *In re Sinclair*:

What "clearly" means one thing to a reader unacquainted with the circumstances of the utterance—including social conventions prevailing at the time of drafting—may mean something else to a reader with a different background. Legislation speaks across the decades, during which legal institutions and linguistic conventions change. To decode words one must frequently reconstruct the legal and political culture of the drafters. Legislative history may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words would be understood. It may show, too, that

210. Easterbrook, *supra* note 205, at 64-65.

211. *Id.* at 65 (citing *The Federalist No. 10* at 77-81 (J. Madison)).

212. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947).

213. *In re Russell E. Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989).

214. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

215. See *supra* Part II.B.

216. *In re Matter of Sinclair*, 870 F.2d at 1342.

words with a denotation "clear" to an outsider are terms of art, with an equally "clear" but different meaning to an insider. It may show too that the words leave gaps, for short phrases cannot address all human experience; understood in context, the words may leave to the executive and judicial branches the task of adding flesh to bones. These we take to be the points of cases . . . holding that judges may learn from the legislative history even when the text is "clear." Clarity depends on context, which legislative history may illuminate.²¹⁷

This use of legislative history should be much more narrow and focused than that prescribed by traditional defenders of legislative history like Justice Breyer.²¹⁸

V. THE ANALOGY BETWEEN THE INTERPRETATION OF STATUTES AND CONTRACTS

Another way to think about the interpretation of a statute is to analogize it to the interpretation of a contract. Judge Easterbrook stated in a journal article that statutes should be treated like contracts.²¹⁹

Statutes are not exercises in private language. They should be read, like a contractual offer, to find their reasonable import. They are public documents, negotiated and approved by many parties in addition to those who write the legislative history and speak on the floor. The words of the statute, and not the intent of the drafters, are the "law."²²⁰

If statutes are analogized to contracts, one can look at the purpose of contract law to help learn the benefit of following the political agreement made between parties voting on a statute. While there are many theories as to the purpose of contract law, two leading theories are the "enforcement of expectations" theory and the "economic efficiency" theory.

The enforcement of expectations theory has been advanced by many scholars, most notably Arthur Corbin and Allan Farnsworth. Corbin maintains that "[t]he [m]ain [p]urpose of [c]ontract [l]aw [i]s the [r]ealization of [r]easonable [e]xpectations [i]nduced by [p]romises."²²¹ Likewise, Farnsworth wrote that the good faith obligation serves to

217. *Id.* at 1342.

218. *See supra* Part II.A.

219. Easterbrook, *supra* note 205, at 60.

220. *Id.*

221. Arthur L. Corbin, *Corbin on Contracts* § 1.1, at 2 (Joseph M. Perillo ed., rev. ed 1993).

prevent a party from being "deprived of his reasonable expectations."²²²

Along the same lines as the expectation theory, Llewellyn saw the purpose of contract law as helping to achieve maximum economic efficiency, stating that the "most vital single aspect of contract law" is working against the contract dodger, who interferes with the free flow of commerce.²²³ These two views reinforce one another, because as contract law enforces parties' expectations, economic efficiency is promoted.

What does contract theory have to do with legislative history? Legislative factions who vote on bills are similar to parties who contract with one another. Each has interests for which it enters into negotiations. The political compromises created are a tangible and important aspect of any final piece of legislation. The political players expect their compromises to be preserved, just as parties that contract with one another expect the respective promises made to be honored. If legislators see that judges do not always honor the political compromises that were made, it leads to less efficient negotiating within the legislature. Each side must then take their own steps to guard against a misinterpretation of any particular political compromise. The other result is that in some cases political compromise may be frustrated altogether. In other words, democracy functions less efficiently.

To illustrate this point, imagine the case of a controversial (affirmative action) bill coming before a legislature. One side may favor a more aggressive, pro-affirmative action position; while the other side may support a less aggressive, but still pro-affirmative action, position. There may be room for compromise between these two positions and language could be passed into law effectuating that delicate compromise. However, if legislators favoring the less-aggressive position worry about judges ignoring the plain meaning of the statute, those legislators may hesitate to make a political deal, or they may refuse to make a deal at all. If legislators fear that judges might not honor a democratic compromise, then everybody loses.

A similar analogy can be made to the laws of trusts and estates. The

222. E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 669 (1963).

223. Allen R. Kamp, *Between-The-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 337 (1995) (quoting Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L. J. 704, 725 n.47 (1931)).

wishes of individuals expressed in their wills are honored not just because of libertarian notions of personal property, but also to serve as an incentive to bring forth creativity, hard work, initiative, and ultimately productivity, which benefits society as a whole.²²⁴

Therefore, one of the main purposes of valuing prior agreements, whether in contract law, estate law, or statutory interpretation, is not just to honor the past agreement itself, but also to promote certain desirable conduct in the present and future. This is a forward-looking purpose which stems from looking back at the prior agreement.

If statutes are analogized to contracts between the various political factions, judges should consider evaluating legislative history in terms of the parole evidence rule and other similar contract rules. As with contracts, judges would assume that the statute is a final expression of agreement between the political factions involved in the debate. Judges would also assume that each statute is a complete integration for the purposes of a "statutory parole evidence rule." Each statute contain an inherent "merger clause" which would indicate that all prior communications (or legislative history) are "merged" into the written agreement. The language of the statute would adequately reflect the legislative history.

Just as with interpreting contracts, judges should follow the general rule that an integrated agreement overrides previous inconsistent agreements.²²⁵ It is important to remember that the parole evidence rule does not preclude use of extrinsic evidence offered for the purpose of lending meaning to contract terms. As with earlier agreements, legislative history may help in the interpretation of the statute, but it may not contradict it.²²⁶ However, if agreements or comments in legislative history are inconsistent with the language of the statute, the statute (or the integrated agreement) should control.

The rules for interpreting ambiguous terms in a contract are analogous to those for interpreting an ambiguous statute. Where the contract is ambiguous, parties may introduce evidence of specific statements and agreements to show the intended meaning of contract terms. The general application of this principle is rather narrow, however, because it is applicable only where the court is unable to

224. Edward C. Halbach, Jr., *Death, Taxes and Family Property* 5-7 (E. Halbach ed. West Publishing Co., 1977), reprinted in JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS AND ESTATES* 16 (4th ed., Little Brown and Company, 1990).

225. RESTATEMENT (SECOND) OF CONTRACTS § 213(1) cmts. a & b (1981).

226. *Id.* at § 214(c) 215 cmt. b.

interpret the contract. If the meaning of the contract is plain and unambiguous, such evidence should not be admitted to assist in its interpretation.

The method of dealing with an ambiguous contract term is important because of the nature of the inquiry. Judges study extrinsic evidence to discover the meaning of the contract terms, not to find the intent of the parties. This contract inquiry is the same inquiry prescribed by Judge Easterbrook when interpreting a statute.²²⁷ In reading a contract, a judge would not throw out the text of the contract and start to reconstruct the intent of the parties on their own. A judge must stick to the guideposts to find their way. A parole evidence view of statutory interpretation, which corresponds to Judge Easterbrook's statutory interpretation method, allows the judge to honor the "contract" made between the political factions who made compromises and passed the statute and does not discourage legislators from making their political compromises.

VI. WISCONSIN STATE COURTS

While state courts hear a large percentage of the total number of cases in this country and state legislatures are passing an increasing number of statutes requiring judicial interpretation, very little attention has been paid to the use of legislative history at the state court level. This may be partly because state legislatures typically generate legislative history which is smaller in volume and less complicated to review than their federal counterpart. This may also be because state courts do not hear as many politically-charged cases which typically lend themselves to abuse or misuse of legislative history.

It is interesting to use Wisconsin for a study of the use of legislative history at the state court level because on the continuum of state courts, its system would be considered typical in its treatment of legislative history. Wisconsin state courts have not expressed direct opposition to using legislative history to interpret a statute, such as that exhibited by Justice Scalia, but many of the state's judges do not abuse legislative history per se. While Wisconsin is typical, there are certain important idiosyncrasies litigators should be aware of when arguing in Wisconsin state courts.

Wisconsin courts do not immediately rely upon legislative history. In *Wagner Mobil, Inc. v. City of Madison*, the Supreme Court of Wisconsin

227. See *supra* Part IV.

stated:

The aim of all statutory interpretation is to discern the intent of the legislature. In ascertaining a statute's meaning, our first inquiry is to the plain language of the statute. If the language of the statute clearly and unambiguously sets forth the legislative intent, it is the duty of the court to apply that intent to the case at hand and not look beyond the statutory language to ascertain its meaning.²²⁸

The Court continued, "[o]nly when the statutory language is found to be ambiguous will this court examine the scope, history, context, subject matter and object of the statute in discerning the intent of the legislature."²²⁹

Wisconsin courts are given tremendous latitude to judge ambiguity in a statute:

A statute, or portion thereof, will be found to be ambiguous when it is capable of being understood by reasonably well-informed persons in either of two or more senses. In considering the question of ambiguity, however, it is obvious that parties may disagree as to the meaning of a given statute. This alone cannot be controlling. The court should look to the language of the statute itself to determine if "well-informed persons" *should have* become confused.²³⁰

Legislative history is taken very seriously by Wisconsin courts and sometimes has risen to the level of dictating decisions. One interesting example is *State v. Hufford*, where the Court of Appeals ruled that Wisconsin's "restitution statute" was not actually meant to provide restitution for victims, but instead was intended to provide less.²³¹ The issue in *Hufford* was whether a trial court in a criminal matter had the authority to impose interest as part of a restitution award.²³² The

228. 527 N.W.2d 301, 303 (Wis. 1995) (quoting *Doe v. American Nat'l Red Cross*, 500 N.W.2d 264, 266 (Wis. 1993)).

229. *Id.* at 304 (citing *Cynthia Er. v. LaCrosse County Human Services Dep't*, 493 N.W.2d 56, 59 (Wis. 1992)).

230. *Id.* (quoting *National Amusement Co. v. Department of Revenue*, 163 N.W.2d 625, 628 (1969)).

231. *State v. Hufford*, 522 N.W.2d 26 (Wis. Ct. App. 1994).

232. Wis Stat. subsection 973.20(1) provides that the trial court, when imposing sentence or ordering probation, "shall order the defendant to make full or partial restitution to any victim of the crime." WIS STAT. § 973.20(1) (1987). Under subsection 973.20(5)(a), the trial court may order the defendant to pay "all special damages, but not general damages, substantiated by evidence in the record, which could be recovered in a civil action against the defendant for his or her conduct in the commission of the crime." WIS. STAT. § 973.20(5)(a) (1987).

original state restitution statute (Wis. Stat. 1979-80, section 973.09(8)(c)) expressly provided for interest, but the 1981 amendment (Wis. Stat. 1985-86, section 973.09) removed any mention of a victim receiving interest—which the *Hufford* court took as clear sign of legislative intent to do away with the provision for interest.²³³ This restitution statute was in turn repealed and replaced with the current language which was specifically patterned after the federal restitution statute but incorporated parts of the former Wisconsin restitution statute (the 1981 amendment). The question which plagued the *Hufford* court was whether the legislature intended to reintroduce what it had expressly repealed six years before by blending these two statutes.²³⁴

The court's task was complicated by the fact that neither the 1987 Wisconsin Judicial Council Note (the promulgator of the new statute) on the relevant section nor the minutes of the Council's Restitution Committee addressed the specific restitution issue. While the federal statute is also silent on the issue of providing interest, federal courts have uniformly construed the federal restitution statute to include interest. The State argued that the term "special damages" included interest for victims, but the *Hufford* court noted that the federal statute did not include the term "special damages."²³⁵ Without expressed legislative intent of a return to providing for interest, the court refused to implement such an interpretation. The *Hufford* court admitted that "we are not happy with the result, and that a 'make whole' remedy for the loss of money should . . . include interest as well as the present value of money."²³⁶ Ultimately the court concluded "[w]ere we writing on a clean slate, without the baggage of our legislative history, we would rule the same way [as the federal courts]. The federal courts were not so saddled [with the same legislative history]."²³⁷ As a result, the Wisconsin restitution statute does not provide restitution. One must ask what kind of "baggage" do the Wisconsin courts carry when they bring along legislative history (or as in *Hufford*, a lack of legislative history), and does this baggage help more than it hinders in finding the true intention of the state legislature?

While Wisconsin courts have generally not found ambiguity where none exists, there have been cases where a court has simply ignored

233. *Hufford*, 522 N.W.2d at 27.

234. *Id.*

235. *Id.* at 28.

236. *Id.* at 29.

237. *Id.*

plain meaning and then manufactured a result from an intricate web of legislative history. One of the best examples is the majority opinion by the Supreme Court of Wisconsin in *Grosse v. Protective Life Insurance Co.*²³⁸

In *Grosse*, the widow Grosse filed action to collect life insurance proceeds from a policy issued to her deceased husband. Her husband had passed the exam performed by Protective Life's medical examiner, but he learned he had cancer before making the first payment of his premium. The issue before the Supreme Court of Wisconsin was whether Protective Life was estopped under sec. 632.50, Wis. Stat., from asserting as a defense the deceased's change of health between the time of the exam and the first payment of his premium.

The majority's opinion, written by Justice Bablitch, found Wisconsin Statute section 632.50 to be ambiguous. Section 632.50 states:

If under the rules of any insurer issuing life insurance, its medical examiner has authority to issue a certificate of health, or to declare the proposed insured acceptable for insurance, and so reports to the insurer or its agent, the insurer is estopped to set up in defense of an action on the policy issued thereon that the proposed insured was not in the condition of health required by the policy at the time of issue or delivery, or that there was a preexisting condition not noted in the certificate or report

....²³⁹

The insurance company had no expressed policy as to whether or not its examiners could bind the company.

The insurance company contended that the statute only applied when an insurance company has enacted formal rules authorizing its medical examiners to declare an applicant fit for insurance. The widow Grosse contended that "the statute applie[d] even when an insurance company has no formal rules but authorize[d] its medical examiner to declare an applicant fit for insurance by soliciting the examiner's opinion in a written medical report."²⁴⁰ The majority opinion relied on a wide variety of types of legislative history to ultimately rule in favor of the widow Grosse. The court found the original statute in 1911 was based upon an Iowa statute and quoted an 1899 Iowa Supreme Court case. The court then cited a passage from the minutes of the Insurance Law Revision Committee (ILRC), a Legislative Committee created by the

238. 513 N.W.2d 592 (Wis. 1994).

239. WIS. STAT. § 632.50 (1991-92) (emphasis added).

240. *Grosse*, 513 N.W.2d at 596.

legislature to study and revise the insurance laws.²⁴¹ However, the majority opinion read the ILRC passage and gave it a *new* third interpretation—*different* from both the petitioner's and the respondent's interpretations.²⁴² Finally, the court cited a paper presented by a former member of the Industry Advisory Committee (another committee involved in the revision process) to the Association of Life Insurance Counsel in 1977. The majority opinion acknowledged that "statements from non-legislative sources do not carry as much probative value as official statements,"²⁴³ but the Court continued:

When . . . a contemporaneous report or other document from a nonlegislative agency or even a private party forms a *vital link* in the chain of legislative history of a particular statute, such unofficial report or other document may be used to determine the legislative intent behind the statute.²⁴⁴

The majority opinion ultimately ruled that the insurance company was estopped from offering evidence of changed condition. The Court ruled the statute estopped insurers *unless* they promulgated rules stating that their medical examiners *did not* have the authority to bind the company.

The dissent in *Grosse* written by Justice Steinmetz (and joined by Justices Wilcox and Geske) accused the majority of ignoring a basic rule of statutory interpretation: if a statute is clear on its face, do not look to the history of the statute when interpreting it.²⁴⁵ The dissent argued that the legislature had amended the statute to reduce the insurance industry's liability in response to an earlier decision by the Supreme Court of Wisconsin. The language of the statute clearly states that companies are only liable if they have rules providing authority to their examiners to bind the company (which the respondent did not have in this case). The dissent accused the majority of attempting to circumvent the language of the statute by finding the language ambiguous and then examining sources of legislative history.²⁴⁶

This statute is not ambiguous. What more must the legislature say in order to limit estoppel to situations where the medical

241. The Court noted that an official comment by a legislation-created committee is valid evidence of legislative intent. *Id.* at 598. See also *Ball v. District No. 4, Area Board*, 345 N.W.2d 389 (Wis. 1984).

242. *Grosse*, 513 N.W.2d at 598.

243. *Id.* at 599.

244. *Id.* at 599 (quoting *Ball*, 345 N.W.2d at 389) (emphasis added).

245. *Grosse*, 513 N.W.2d 601 (Steinmetz, J., dissenting).

246. *Id.*

examiner acts pursuant to rules of the insurance company, than "[i]f under the rules of any insurer issuing life insurance . . . ?" Must the legislature say "we really mean it?"²⁴⁷

Even though the dissent acknowledged that its inquiry could end with the plain meaning of the statute, Justice Steinmetz presented legislative history to support the plain meaning of the statute. The dissent cited a committee comment which stated, "[i]t is made less severe as against the insurer by binding the insurer only if the medical examiner is acting under the insurer's rules."²⁴⁸ This quote made it that much clearer that legislative history (at best) is often indeterminate, and (at worst) can be manipulated by judges to reach a result in opposition to the plain meaning of a statute.

The practice of reviewing legislative history even when the language of the particular section is clear is encouraged by certain Wisconsin court practices such as the "alternative plain meaning rule." What was later termed the alternative meaning rule can be found in *City of Madison v. Town of Fitchburg*: "[t]his court has consistently stated that the spirit or intention of a statute should govern over the literal or technical meaning of the language used."²⁴⁹ In *City of Madison*, the majority had to interpret Wisconsin Statute section 62.05 governing the categorizing of cities into distinct classes. Evoking the alternative plain meaning rule, the majority relied upon a 1923 opinion of the attorney general to interpret apparently plain language in the statute—claiming the attorney general presented the correct analysis of the law.²⁵⁰

Reliance upon the alternative plain meaning rule did not pass without criticism. In her dissent, Justice Abrahamson not only attacked the presented legal genesis of the alternative plain meaning rule,²⁵¹ but she also attacked the practical use and result of such a rule:

In this case, the court does not—and cannot—say that the statutory language is ambiguous, thwarts the manifest purpose of the statute, or leads to an absurd result. Thus the plain meaning rule, a rule which has its critics, including myself, but which this court invariably uses . . . governs. If there ever was a situation

247. *Id.* at 601 (Steinmetz, J., dissenting).

248. *Id.* at 601-02 (Steinmetz, J., dissenting).

249. 332 N.W.2d 782, 787 (Wis. Ct. App. 1983).

250. *Id.* at 787-88.

251. "The majority attempts to derive this canon from the *Leicht*, *Skubitz*, and *Mussallem* cases, the last two of which rest on *Leicht*. These cases do not stand for the proposition that this court can be guided by the statute's 'spirit' when it chooses to ignore the words." *Id.* at 790 (Abrahamson, J. dissenting).

for application of the rule, this is it. I am concerned that the court fails even to attempt to establish a coherent approach to the problem of statutory interpretation. This case . . . cannot help but confuse lawyers and legislators.²⁵²

Justice Heffernan wrote a brief dissent which was a less analytical, but more strongly worded criticism of the majority opinion and its approach.²⁵³

The alternative plain meaning rule survived and has occasionally been used by Wisconsin courts to interpret statutes. Some courts have even added the alternative plain meaning rule as a second step of statutory analysis—first determining the plain meaning of a rule, and then applying the alternative plain meaning rule to confirm and support the plain language of the statute.²⁵⁴

While the alternative plain meaning still exists in Wisconsin precedent, it has been criticized and has not been widely used to circumvent the plain meaning of the statute. One recent example is *Madison Teachers, Inc. v. Madison Metropolitan School District*, where the Court of Appeals rejected the Defendant-Appellant's argument looking past the plain meaning of the statute and relying on the alternative plain meaning rule.²⁵⁵ The court stated that the inquiry is more complicated: "Taking into account 'purpose' merely aids determining the legislature's intent. To describe the search for purpose as an

252. *Id.* at 790-91 (Abrahamson, J., dissenting).

253. *Id.* at 790 (Heffernan, J., dissenting). Justice Heffernan stated:

I differ from Justice Abrahamson only to the degree that she asserts that the majority's error stems from ignoring the literal language of the statute. I am compelled to conclude that the problem is not one of literalness, but of literacy. The majority's conclusion defies the expressed will of the legislature and a common sense understanding of the English language.

Id.

254. See *Mullen v. Coolong*, 393 N.W.2d 110, 113-14 (Wis. Ct. App. 1986), *rev'd on other grounds*, *Nicholson v. Home Ins. Cos.*, 405 N.W.2d 327 (Wis. 1987).

255. 541 N.W.2d 786, 795-96 (Wis. Ct. App. 1995). The court elaborated on its philosophy by citing a treatise on statutory interpretation:

Considerations of what purpose legislation is supposed to accomplish are often mentioned as grounds for the interpretation given to a statute. Explanation of the purpose is a way of focusing attention on an insight about intent or meaning. Judicial Frustration, if not usurpation, of legislative authority, may be the result of reflexive judicial construction arrived at exclusively by considering the language of the statute on the basis of the judge's own received impressions as to what the language means, without regard for the purpose of the act and other aids of interpretation.

Id. (citing SUTHERLAND STATUTORY CONSTRUCTION, Vol 2A, § 45.09 (5th ed. 1992)).

'alternative rule' overstates the reason for the search."²⁵⁶

When Wisconsin courts find ambiguity in a statute, they are allowed to carry out a very broad search for the statute's true meaning. In addition to examining the language of the statute, the court must look at the scope, history, context, subject matter, and purpose of the statute.²⁵⁷ This has led Wisconsin courts to review questionable sources of legislative history. One such example is referring to analysis by the Legislative Reference Bureau.

The Legislative Reference Bureau's analysis of legislation is much like Congressional committee reports which are criticized by Justice Scalia, except that such analysis doesn't have the pretense of being written by elected officials (even though Congressional committee reports are written and mostly read by Congressional staff). The Legislative Reference Bureau's analysis of state legislation is required by Wisconsin Statute section 13.92(1)(b)2.²⁵⁸

Wisconsin courts have ruled that an analysis of a bill by the Legislative Reference Bureau is indicative of legislative intent.²⁵⁹ Picking strands of language from bureau analysis approximates picking strands of language from committee reports. The bureau's interpretations are often followed by courts, but members of the bureau are not elected officials.

Sometimes bureau analysis is clear to understand—stating the purpose of particular sections. One example can be seen in *McLeod v. State of Wisconsin*.²⁶⁰ In *McLeod*, the Court of Appeals ruled that the battery-to-a witness statute applied to future witnesses as well as past witnesses.²⁶¹ The *McLeod* court justified its ruling with the plain meaning of the statute and canons, but the court also felt the need to

256. *Madison Teachers, Inc.*, 541 N.W.2d at 795.

257. *State ex rel Sielen v. Circuit Court for Milwaukee County*, 499 N.W.2d 657, 659 (Wis. 1993).

258. WIS. STAT. § 13.92(1)(b) (1979). The statute provides in pertinent part: Drafting section. The legislative reference bureau shall provide drafting services equally and impartially and to the limits of its facilities and staff. In the performance of its drafting services, the bureau shall:

2. Prepare in plain language an analysis of each original measure, to be printed with the measure when it is introduced.

Id.

259. *Chernetski v. American Family Mutual Insurance Co.*, 515 N.W.2d 283, 287 n.3 (Wis. Ct. App. 1994) (referring to *McLeod v. State of Wisconsin*, 271 N.W.2d 157, 160 (Wis. Ct. App. 1978)).

260. *McLeod*, 271 N.W.2d at 160.

261. *Id.*

support its conclusion with legislative history. The court cited analysis by the Legislative Reference Bureau which stated, "*Purpose*: This statute is aimed at the organized criminal practice of preventing witnesses from testifying in grand juries or at trials."²⁶² This bureau analysis settles the issue of whether the statute dealt with both past and future witnesses.

Another typical example of the use of analysis by the Legislative Reference Bureau can be found in *Chernetski v. American Family Mutual Insurance Co.*, where the court had to determine whether bicycles in a crosswalk have the same rights and duties as vehicles do toward other vehicles.²⁶³ The analysis of the Legislative Reference Bureau does not always have the most solid basis, even though it can be afforded significant deference. In *White Hen Pantry v. Buttke*,²⁶⁴ the Supreme Court of Wisconsin consulted the analysis of the Legislative Reference Bureau to find that ninety days prior written notice is required under the Wisconsin Fair Dealership Law to terminate a franchise arrangement due to nonpayment of sums.²⁶⁵ The analysis of the Wisconsin Fair Dealership Law did not actually come from the bureau. The initial draft of the law was submitted to the bureau by the Governor's Legal Counsel. That original draft contained a provision "substantially similar" to the present section in question.²⁶⁶ The commentary by the Governor's Legal Counsel was adopted by the bureau as its own, and accompanied the bill which passed the state legislature.²⁶⁷ In essence, the real legislative history for the bill came from the Governor's office, but was presented as coming from the non-partisan Legal Reference Bureau. Care must be taken to see where and how the Legal Reference Bureau received its analysis.

Wisconsin courts have obviously not found every statute to be ambiguous. One good example is *Bell v. Employers Mutual Casualty Co. of Des Moines, Iowa*.²⁶⁸ *Bell*, in part, involved whether Wisconsin Statute sections 102.29(4) and (5) allows an extension of the statute of limitations when another state's statute of limitations applies for a

262. *Id.* at 160 (quoting LEGISLATIVE REFERENCE BUREAU, ANALYSIS OF ASSEMBLY BILL 859).

263. *Chernetski*, 515 N.W.2d at 283.

264. *White Hen Pantry v. Buttke*, 301 N.W.2d 216 (Wis. 1981).

265. *Id.*

266. *Id.* at 221.

267. *Id.* at 220-21.

268. *Bell v. Employers Mutual Casualty Co. of Des Moines, Iowa*, 541 N.W.2d 824 (Wis. Ct. App. 1995).

personal injury action against a third party by an injured employee in the event that the insurer has failed to promptly notify certain appropriate parties.²⁶⁹ Both sides agreed that Employers Mutual failed to promptly notify the appropriate parties. The court found that section 102.29 was unambiguous and that the three year extension to the statute of limitations only applied when the applicable statute of limitations is Wisconsin Statute section 893.54, but in this case the applicable statute was an Iowa state statute.²⁷⁰ The plaintiffs argued that the history of section 102.29(5) and its earlier versions indicated that there was a drafting error in the current version. However, the court found that the statutory language was unambiguous, and that “[l]egislative history cannot be used to demonstrate that a statute, unambiguous on its face, is ambiguous.”²⁷¹

There are other examples of Wisconsin courts finding statutes to be unambiguous. In *Voss v. City of Middleton*,²⁷² the Supreme Court of Wisconsin found that the word “abutting” was unambiguous and it did not describe the situation between two adjoining pieces of property in the city of Madison and the city of Middleton—thereby preventing Madison from vetoing Middleton’s action to vacate a street within their own city limits.²⁷³ In *Graziano v. Town of Long Lake*,²⁷⁴ the Court of Appeals found that when a town meeting “authorizes” a town board to take a particular action, it unambiguously does not “compel” a town

269. WIS. STAT. SEC. 102.29 (1989). The statute provides in pertinent part:

(4) If the employer and the 3rd party are insured by the same insurer . . . the employer’s insurer shall promptly notify the parties in interest and the department . . .

(5) An insurer subject to sub. (4) which fails to comply with the notice provision of that subsection and which fails to commence a 3rd party action, within the 3 years allowed by §893.54, may not plead that §893.54 is a bar in any action commenced by the injured employee under this section against any such 3rd party subsequent to 3 years from the date of injury, but prior to 6 years from such date of injury . . .

Id.

270. *Bell*, 541 N.W.2d at 831.

271. *Id.* at 832. It is interesting to note the precedent for this point. Judge Vergeront cited the Wisconsin Supreme Court in *State v. Martin* for this proposition. *Id.* In *Martin*, the Wisconsin Supreme Court stated this proposition and then, in a manner of speaking, immediately ignored it by reviewing legislative history in *Martin* to show that an unambiguous statute was indeed unambiguous. *State v. Martin*, 470 N.W.2d 900, 905 n.5 (Wis. 1991). However, Judge Vergeront in *Bell* followed the plain meaning of the legal proposition and refused to review legislative history—choosing to follow the words and not the actions of the Wisconsin Supreme Court. *Bell*, N.W.2d at 832.

272. 470 N.W.2d 625 (Wis. 1991).

273. *Id.*

274. 530 N.W.2d 55 (Wis. Ct. App. 1995).

board to take that action.²⁷⁵

Even though Wisconsin courts have expressly stated that they should not use legislative history when the meaning of the statute is plain, courts have found a way to circumvent this rule and use legislative history. In *State v. Martin*,²⁷⁶ the Supreme Court of Wisconsin found that Wisconsin Statute section 973.12(1) unambiguously stated that repeater amendments could not be made to charges against defendants after they had pleaded not guilty to the underlying charges.²⁷⁷ The court ignored its rule of refusing to consult legislative history when the statute is unambiguous:

Section 973.12(1) is not ambiguous. We undertake an historical analysis only for the purpose of demonstrating that the legislative history makes clear that no repeater charge can be added after any plea. While legislative history cannot be used to demonstrate that a statute unambiguous on its face is ambiguous, there is no converse rule that statutory history cannot be used to reinforce and demonstrate that a statute plain on its face, when viewed historically, is indeed unambiguous.²⁷⁸

This referral to legislative history to support a finding of an unambiguous statute has been followed by the Court of Appeals.²⁷⁹

It is unclear what purpose such a referral to legislative history serves. If it confirms the court's view, then such an inquiry was an unnecessary crutch for the court's decision. If the legislative history contradicts the plain meaning of the statute, the court is not able to allow the legislative history to overrule the plain meaning which has been passed into law.

Justice Scalia finds such an inquiry to be more than simply excessive: [Use of legislative history to confirm an apparent plain meaning] is not merely a waste of research time and ink; it is a false and disruptive lesson in the law. It says to the bar that even an "unambiguous [and] unequivocal" statute can never be dispositive; that, presumably under penalty of malpractice liability, the oracles of legislative history, far into the dimmy past, must always be consulted. This undermines the clarity of law, and condemns litigants (who, unlike us, must pay for it out of their own pockets) to subsidizing historical research by lawyers [N]ot the least

275. *Id.*

276. 470 N.W.2d 900 (Wis. 1991).

277. *Id.*

278. *Id.* at 905 n.5.

279. See *Novak v. Madison Motel Assocs.*, 525 N.W.2d 123, 126 (Wis. Ct. App. 1994).

of the defects of legislative history is its indeterminacy.²⁸⁰

At worst, allowing for such an inquiry provides an opportunity for judges to go back (behind the scenes) and reclassify what they originally thought to be unambiguous to actually be ambiguous, and then to rule accordingly (and ignore the plain meaning). Such an abuse of legislative history is very difficult to definitively identify.

One of the major criticisms of legislative history by Justice Scalia and others is that it is indeterminate; often conflicting with itself or allowing for multiple interpretations.²⁸¹ This can be seen in *Kyle S.G. v. Carolyn S.G.*, a case where the Supreme Court of Wisconsin, among other issues, had to decide whether Wisconsin Statute section 48.415-(1)(a)(3) created a rebuttable presumption of abandonment of a child by their parents—once several conditions were demonstrated.²⁸² The majority opinion, written by Justice Bablitch, found that the presumption existed in section 48.415 and was evidenced both in the language of the statute and the legislative history. The court cited both an earlier draft of the statute and analysis by the Legislative Reference Bureau of the early drafts which specifically stated that such a presumption existed.²⁸³ The majority opinion assumed that if the presumption had been mentioned before in an earlier draft, that existence would carry over to later drafts.

The dissent in *Kyle* reviewed the same legislative draft and reached the opposite conclusion. In the dissent, Justice Abrahamson referenced the explicit creation of a presumption of abandonment in the early drafts but noted that version was rejected by the legislature (it was not

280. *Conroy*, 507 U.S. at 519 (Scalia, J., concurring).

281. *See supra* Part II.B.

282. 533 N.W.2d 794 (1995). Wisconsin Statute subsection 48.415(1)(a)(3) provides that abandonment may be established by a showing that: (1) the child has been left by the parent with a relative or other person; (2) the parent knows or could discover the whereabouts of the child; and (3) the parent has failed to visit or communicate with the child for a period of one year or longer. WIS. STAT. § 48.415(1)(a)(3) (1993).

Wisconsin Statute subsection 48.31(1), provides that the party seeking to terminate parental rights must prove these basic facts by clear and convincing evidence. WIS. STAT. § 48.31(1) (1993). Once these facts are established, section 48.415(1)(c) provides that the showing "may be rebutted by other evidence that the parent has not disassociated himself or herself from the child or relinquished responsibility for the child's care and well-being." WIS. STAT. § 48.415(1)(c) (1993). That is, the natural parent may rebut the presumption of abandonment with evidence of non-disassociation.

283. *Kyle S.G.*, 533 N.W.2d at 798 (quoting Drafting record, Laws 1979, ch. 330: "Abandonment may be presumed wherever the child is found in circumstances which manifest that the parent has left the child with the clear intent to disassociate himself or herself from the child and to relinquish responsibility for the child.")

mentioned whether the early version was actually voted on by the legislature or it simply did not become law).²⁸⁴ The dissent noted that the legislature adopted a "substantially different" bill which made no mention of the presumption.²⁸⁵ Thus, the dissent drew the conclusion that "the legislative history evidences that the legislature discarded the presumption approach to abandonment in favor of a different tack."²⁸⁶ Whether that was true is certainly unclear. What is clear is that the court's in-depth forage into the Wisconsin State Law Library microfiche to dust off old drafts of bills which themselves were never passed is a technique which is questionable at best.

An ambiguous statute does not mean that Wisconsin judges must automatically resort to legislative history. While most judges go right to a statute's history, some judges under certain circumstances choose not to reference legislative history even when the statute is ambiguous. Judge Vergeront on the Court of Appeals chose to only reference the dictionary and the statute's context to interpret an ambiguous statute to enforce an order terminating a parental right in *Interest of Rhonda R.D. v. Franklin*.²⁸⁷

In *Rhonda R.D.*, the mother had separated from her husband who resided in Franklin, Washington, and took their child with her to Wisconsin. Ultimately she received a divorce and custody of their child, and then petitioned to terminate Franklin's parental rights on grounds of abandonment. Under Wisconsin law abandonment may be established by a showing that

The child has been left by the parent with a relative²⁸⁸ or other person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child for a period of one year or longer.²⁸⁹

While Franklin had not had contact with his son for a number of years,²⁹⁰ he argued that his son had been taken from him and not left with his mother. Chapter 48 did not contain a definition of "left," and

284. *Id.* at 801.

285. *Id.* at 801 (Abrahamson, J., dissenting.)

286. *Id.*

287. 530 N.W.2d 34 (Wis. Ct. App. 1995).

288. The term "relative" is defined under Wisconsin Statute subsection 48.02(15) to include a parent. WIS. STAT. § 48.02(15) (1994).

289. WIS. STAT. § 48.415(1)(a)(3) (1994).

290. A jury had found that Franklin, contrary to his testimony, had not adequately tried to contact his child over the years. *Rhonda, R.D.*, 530 N.W.2d at 43-45. At the time of the trial, Franklin could not try to visit his child because he was in prison in Washington. *Id.*

the majority found that its ordinary meaning in the dictionary was ambiguous.²⁹¹

To resolve this problem, the majority used a Scalia-style analysis. After looking at the context and purpose of the statute expressed in its text, the majority determined that the jury's definition of "left with" was the correct one, deciding that the key was not how the child ended up with the relative, but rather what the surrendering parent did afterwards.²⁹² At no point did the majority look to legislative history to make their determination.

The dissent in *Rhonda R.D.*, however, relied heavily upon legislative history to resolve the ambiguity. In the dissent, Judge Dykman focused on the fact that Christopher D. was "taken" from Franklin (not "left" with the mother for all of those years) and that the section in question was not ambiguous.²⁹³ Even if the section were ambiguous, the dissent claimed the purpose of the statute found in the legislative history pointed toward a narrow definition of the word "abandonment," and a greater hesitancy by the legislature to separate children from parents.²⁹⁴

The legislative history relied upon by Judge Dykman was a compilation of memos by a private lobbying organization and a comparison of drafts presented by the Legislative Reference Bureau.²⁹⁵ A staff attorney and policy specialist with the Youth Policy and Law Center, Inc. sent a memo with draft language to the Legislative Reference Bureau accompanied with a letter asking the bill drafter to consider the dissent by a Wisconsin Supreme Court Justice in an earlier case on a related issue.²⁹⁶ This draft version was sent to a state representative, and was found by the dissent to be "remarkably similar" to the present statute.²⁹⁷ The dissent cited several memos from the private lobbyist for the proposition that the statute contained a narrow definition of abandonment.²⁹⁸ The dissent also cited another version of legislation on this topic which contained a broader definition of abandonment, but

291. *Id.* at 43. The court cited Webster's Third New International Dictionary which listed the following definitions of "leave": 1b (3): to cause to be or remain in some specified condition; . . . 2a (1): to permit to remain undisturbed or in the same position. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1287 (1976). The first definition did not apply to Franklin's actions, but the second definition did apply.

292. *Id.* at 43-45.

293. *Id.* at 47-48 (Dykman, J., dissenting).

294. *Id.* at 48-50 (Dykman, J., dissenting).

295. *Id.* (Dykman, J., dissenting).

296. *Rhonda R.D.*, 530 N.W.2d at 48-49 (Dykman, J., dissenting).

297. *Id.*

298. *Id.*

the dissent pointed out that particular version never passed—supporting the assertion that the legislature therefore intended the narrow definition.²⁹⁹

While such a research job is impressive, the conclusion of such an effort was tenuous and ultimately unpersuasive to the majority in *Rhonda R.D.*. Citing private sources for the meaning of legislation is disfavored.³⁰⁰ Lobbyists have their own agendas, whether they are lobbying for businesses or for children's rights. It is impossible to know if the elected officials of the Wisconsin state legislature understood and voted for the meaning encapsulated in a memo written by a private lobbyist.

When a Wisconsin court finds an ambiguous statute, it may use a dictionary before, or in conjunction with, legislative history. The Court of Appeals, in *In Re Appointment of Counsel*, found ambiguity in Wisconsin Statute section 227.40(2)(b), governing under what circumstances a court is authorized to determine the validity of an administrative rule.³⁰¹ The court first used BLACK'S LAW DICTIONARY,³⁰² and then it used legislative history to find that the State Public Defender's determination that the individual was not indigent (thereby failing to qualify for representation at public expense) was not a "criminal prosecution, and, therefore, could not be reviewed by a court."³⁰³

Because it is harder to formulate a contrived interpretation of a statute by using canons and plain language to fool people than it is through the use of legislative history, restricting the use of legislative history helps reduce such abuse. This is just as true in state courts as it is in federal courts. One example of how it is easier to spot "stretching" of a statute through plain language can be seen in *Barnes v. Department of Natural Resources*.³⁰⁴ The court in *Barnes* denied a petition filed by Barnes to review the Department of Natural Resources (DNR) decision

299. *Id.* at 49-50 (Dykman, J., dissenting).

300. *Id.*

301. *In re Appointment of Counsel*, 542 N.W.2d 458, 461 (Wis. Ct. App. 1995).

302. It is interesting to note how dictionaries are sometimes used by Wisconsin courts. Wisconsin courts "must construe all statutory words that are not technical according to common and approved usage." *State v. Timmerman*, 542 N.W.2d 221, 224 (Wis. Ct. App. 1995). This often means using Black's Law Dictionary. *See State v. Demars*, 349 N.W.2d 708, 710 n.7 (Wis. Ct. App. 1989). However, sometimes the definition found in Black's originates in old case law, and Wisconsin Courts have chosen to cite contemporary dictionaries such as Webster's or American Heritage. *See Madison Teachers, Inc. v. Madison Metro. School Dist.*, 541 N.W.2d 786, 794 (Wis. Ct. App. 1995).

303. *In re Appointment of Counsel*, 542 N.W.2d at 461.

304. 506 N.W.2d 155 (Wis. Ct. App. 1993).

not to add the bobcat to the State's list of endangered species. The statute in question defined "endangered species" as one whose "continued existence as a viable component of this state's wild animals . . . is determined by the department to be in jeopardy on the basis of scientific evidence."³⁰⁵

Barnes contended that the DNR erred by not taking into account the French history of the word "jeopardy" when applying these definitions to determine the bobcat's status.³⁰⁶ "Barnes asserted that 'jeopardy' is derived from the French word 'jeu parti,' meaning 'a divided game, a game in which the chances are even,' and consequently if it is an 'even call whether the bobcat is at risk or danger, it is in jeopardy.'"³⁰⁷ The court rejected this stretched interpretation of plain meaning, citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY for the definition of "jeopardy": the "exposure to or imminence of death, loss or injury."³⁰⁸

While Wisconsin courts have not joined Justice Scalia's repudiation of legislative history, his criticism of this tool for interpretation has not gone unnoticed by the state's courts. One example where a Wisconsin court acknowledged Justice Scalia's rejection of legislative history was in *Town of Hallie v. City of Eau Claire*.³⁰⁹ The court in *Hallie* had to decide whether Wisconsin Statute section 66.021(15) prohibiting the creation of "town islands" by another city's annexation of land envisioned neutral impassable territory, such as a no access highway or a lake, as contributing to the enclosure of that town island. The court had made a similar decision in a prior case, finding that such impassable territory helped constitute a town island.³¹⁰

The *Hallie* court determined that the relevant statute was ambiguous and looked to legislative history. Before referencing legislative history, however, the court noted Justice Scalia's warnings about such a practice. "[T]he numerous arguments made by the parties to this litigation evidence the tenuous nature of legislative history analysis. Justice Scalia

305. *Barnes*, 506 N.W.2d at 163 (citing WIS. STAT. § 29.415(2)(a) (1991-92)).

306. The bobcat population was essentially stable, but it recently experienced a minor decline.

307. *Barnes*, 506 N.W.2d at 163 n.6.

308. *Id.* at 163.

309. 501 N.W.2d 49 (Wis. Ct. App. 1993), *overruled by* *Wagner Mobile, Inc. v. City of Madison*, 527 N.W.2d 301 (Wis. 1995).

310. *Town of Sheboygan v. City of Sheboygan*, 483 N.W.2d 306 (Wis. Ct. App. 1992), *overruled by* *Wagner Mobil, Inc. v. City of Madison*, 527 N.W.2d 301 (Wis. 1995). In *Sheboygan*, the town island was cut off from the rest of the town in part by Lake Michigan. *Id.*

has repeatedly warned of over-reliance on legislative history."³¹¹ The court then cited Justice Scalia's concurrence in *Conroy v. Aniskoff*,³¹² noting the illegitimacy and indeterminacy of legislative history.³¹³

The court also mentioned Judge Harold Levanthal's quote (also used by Justice Scalia) comparing the use of legislative history to looking for one's friends in a crowded cocktail party.³¹⁴ While citing these warnings, the Court of Appeals chose to ignore them and decided their case based on legislative history and prior precedent:

However, to extend Judge Levanthal's metaphor, having given the room the once-over and "found our friends," it would be erroneous, not to mention fickle, to again peruse the crowd and re-choose. Therefore, we stand by our interpretation of sec. 66.021(15) in *Sheboygan* and follow it as the binding precedent that it is.³¹⁵

Just two years later the Wisconsin Supreme Court expressly overruled *Sheboygan* and *Hallie* by finding that Wisconsin Statute section 66.021(15) was not ambiguous (that the town island must be completely surrounded by only the annexing city) in *Wagner Mobile, Inc. v. City of Madison*.³¹⁶

Another reference by Wisconsin courts to Justice Scalia and a general warning about the use of legislative history was in *Mortier v. Town of Casey*.³¹⁷ The issue in *Mortier* was whether a town was preempted from regulating the use of pesticides by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).³¹⁸ The court could not find any express preemption language in FIFRA and decided the language was ambiguous.³¹⁹ The court then extensively reviewed the legislative history (predominantly committee reports) of FIFRA to determine that cities and towns were preempted from regulating pesticides.³²⁰

In her dissent, Justice Abrahamson claimed FIFRA was simply silent on the question of preemption and she sharply criticized the majority for

311. *Hallie*, 501 N.W.2d at 51.

312. *Conroy*, 507 U.S. at 519 (Scalia, J. concurring).

313. *Hallie*, 501 N.W.2d at 51.

314. *Id.* (quoting 507 U.S. at 519 (Scalia, J., concurring)).

315. *Id.*

316. *Wagner Mobile, Inc.*, 527 N.W.2d at 301.

317. 452 N.W. 2d 555 (Wis. 1990), *rev'd* by Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991).

318. 7 U.S.C. § 136 *et seq.* (1982).

319. *Mortier*, 452 N.W.2d at 557-58.

320. *Id.*

resting its decision entirely on legislative history.³²¹ Justice Abrahamson found that the legislative history itself was ambiguous: "Courts must use federal legislative history with healthy skepticism, recognizing that the history may not always be a trustworthy indication of congressional intent."³²² Justice Abrahamson then cited Justice Scalia's criticism in *Thompson v. Thompson* of committee reports and floor speeches as sources for law.³²³ After citing other sources of criticism of legislative history, Justice Abrahamson proceeded to critique the majority's use of legislative history to demonstrate that it was indeed indeterminate at best.

The United States Supreme Court in *Wisconsin Pub. Intervenor v. Mortier* reversed the Wisconsin Supreme Court, stating that neither the plain language of the statute nor the legislative history demonstrated the congressional intent to preempt local regulation of pesticides.³²⁴ The eight justice majority took a soft line on the use of legislative history, maintaining that while it did not demonstrate intent in this situation, legislative materials can be useful if employed in a good-faith effort to discern legislative intent.³²⁵ Justice Scalia wrote a lone concurrence, primarily choosing to criticize the use of committee reports because of their unreliability.³²⁶ His concurrence vindicated the mistrust of legislative history expressed by Justice Abrahamson in her dissent in the Wisconsin Supreme Court.

While the use of legislative history is still commonly accepted in Wisconsin, state judges are increasingly resisting the temptation to make long and winding ventures into legislative history, or they are at least more wary of the pitfalls of such ventures.

As textualists such as Justice Scalia continue to write more opinions, this wariness of legislative history will certainly continue at the state court level. While legislative history will always be "fair game" for judges, it will most likely be used in a less frequent and more focused manner, *i.e.*, providing the basis for interpretation only when the intent

321. *Id.* at 562-63 (Abrahamson, J., dissenting).

322. *Id.* at 564 (Abrahamson, J., dissenting).

323. *Id.* at 564 (Abrahamson, J., dissenting) (citing *Thompson*, 484 U.S. at 191-92).

324. 501 U.S. 597, 615-16 (1991).

325. *Id.* at 609-10 n.4. In footnote 4, the majority specifically criticized Justice Scalia's concurrence and expressly endorsed the use of legislative history. *Id.*

326. *Id.* at 617 (Scalia, J. concurring). See Justice Scalia's criticism of committee reports discussed *supra* Part II.B. 39-42. Justice Scalia agreed with the reading of the legislative history by the Wisconsin Supreme Court majority opinion—faulting them only for failing to recognize how unreliable the reports are.

of the state legislature reflected in the legislative history is clear to everyone.

VII. OTHER STATE COURTS

While it has only been a few years since Justice Scalia has been leading the fight against the use of legislative history on the Supreme Court, very few states have specifically picked up this movement and followed his views. Courts will find statutes to be unambiguous and, therefore, not require the review of legislative history, but few have expressly criticized the use of legislative history. Few judges have taken stands against the use of legislative history and refused to join a majority opinion, and instead, like Justice Scalia, chosen to write a concurring opinion devoid of legislative history. There are some exceptions.

One good example of a court criticizing the use of legislative history is *Omaha Public Power District v. Nebraska Department of Revenue* decided by the Supreme Court of Nebraska.³²⁷ The case centered on whether the generation of electricity by the Omaha Public Power District (OPPD) and Nebraska Public Power District (NPPD) constituted the "manufacture" of "tangible personal property" within the meaning of the Employment Expansion and Investment Incentive Act ("the Act") in Nebraska, thereby qualifying them for tax credits worth approximately \$4.8 million.³²⁸ Of the six judge panel, three judges comprised the majority which reversed the lower court's decision and denied the tax credit and three judges comprised the concurrence which also denied the tax credit, but did so without using legislative history.³²⁹

The majority in *Omaha Public Power* used WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY of the English language to state that electricity is not "tangible" as it is energy and not matter with a mass which is "capable of being touched."³³⁰ The majority noted that a scientific discussion of the properties of electricity was legally inconclusive, and instead proceeded to review the legislative history of the Act.³³¹ The history which the majority referred to appeared to state that the purpose of the Act was to provide tax credits to manufacturing businesses only because they create more jobs than service business-

327. 537 N.W.2d 312 (Neb. 1995).

328. *Id.* at 315.

329. *Id.* at 314, 320.

330. *Id.* at 317.

331. *Omaha Public Power*, 537 N.W.2d at 317.

es.³³² The majority also considered the fact that the legislature had traditionally treated public utilities differently than retailers of tangible personal property within the context of sales and use tax laws.³³³ The majority concluded that the public utilities were "service" businesses and did not qualify for tax credits under the Act.³³⁴

The concurrence reached the same result but took a very different route. Justice Caporale, writing the concurrence, used the dictionary to determine that "tangible property" is not ambiguous and does not include electricity: "While under certain circumstances one can feel the presence of electricity, and it can be stored and measured, it has no readily discernible physical form in the sense that do items such as axes, books, cloth, desks, elevators, fiddles, gavels, and the like."³³⁵ The concurrence quoted Justice Scalia for the proposition that the court should not "scavenge" the world of English usage to find possible meanings for words, but rather to "determine whether the *ordinary* meaning includes [it], and if it does not, to ask whether there is any solid indication in the text or structure of the statute that something other than ordinary meaning was intended."³³⁶

Interestingly, most of the concurrence is spent criticizing the majority for consulting the legislative history of the Act. The concurrence criticized the majority's use of committee hearing reports and a comment made during the floor debate of the statute.³³⁷ Judge Caporale quoted Justice Scalia regarding committee reports:

Assuming that all the members of the . . . committees in question . . . actually adverted to the interpretive point at issue here—which is probably an unrealistic assumption—and assuming further that they were in *unanimous* agreement on the point, they would still represent [a vast minority]. It is most unlikely that many [legislators] read the pertinent portions of the Committee Reports before voting on the bill—assuming (we cannot be sure) that the Reports were available before the vote.³³⁸

Judge Caporale also criticized floor debates for being inconclusive in terms of finding statutory meaning. Far less reliable, as sources of

332. *Id.* at 317-18.

333. *Id.* at 318-19.

334. *Id.* at 320 (Caporale, J., concurring).

335. *Id.* at 320 (Caporale, J., concurring).

336. *Id.* (quoting *Chisom*, 501 U.S. at 410 (Scalia, J., dissenting)).

337. *Omaha Public Power*, 537 N.W.2d at 321.

338. *Id.* at 321 (quoting *Wisconsin Public Intervenor*, 501 U.S. at 620 (Scalia, J., concurring)).

statutory meaning

are remarks made during floor debate—even “authoritative” explanations offered by a bill’s sponsors. While a sponsor’s statements may reveal *his* understanding and intentions, they hardly provide definitive insights into [the legislative body’s] understanding of the meaning of a particular provision. Few of his fellow legislators will have been on hand to hear the gloss the sponsor may have placed on a particular provision. Thus members of [the body], in voting on a measure, must be presumed to have relied on the meaning of the words read in context on a printed page. Moreover, a statute’s sponsor may well be pursuing a political agenda in his floor discussion that judges are ill-equipped to detect.³³⁹

Additionally, Judge Caporale discussed the incentives for legislators to distort the legislative record. Any such “suspect” history could provide a “scalpel to excise a provision this court deems unwise, unjust, or simply undesirable, or to change what, in this court’s opinion, ought to have been done some other way.”³⁴⁰ Likewise, a fractional group might be able to submit a number of statements which taken together would be misleading or at least provide enough doubt in the mind of a judge for them to declare legislative history to be indeterminate, when it might otherwise provide an answer.³⁴¹ The Supreme Court of Nebraska is not alone in criticizing the use of legislative history. While clearly more courts use legislative history, and use it without much hesitation, an increasing number are recognizing that it is a unique tool for interpretation which requires caution. Such courts include the Supreme Courts of California and Arizona. Some judges have used legislative history only cautiously after acknowledging its shortcomings and some judges have rejected the use of legislative history altogether.³⁴² In a few of these cases judges have gone a little too far to

339. *Id.* (quoting *Overseas Educ. Ass’n, Inc. v. FLRA*, 876 F.2d 960, 975 (D.C. Cir. 1989) (Buckley, J., concurring)).

340. *Id.* at 322 (quoting *Wang v. Board of Education*, 260 N.W.2d 475, 580 (1977) (Clinton, J., dissenting)).

341. *Id.* at 322-23 (Caporale, J., concurring).

342. *See* *People v. Bransford*, 884 P.2d 70, 75, 80 (Cal. 1994) (en banc) (Kennard, J., concurring and dissenting) (“[T]he majority has gone beyond the stringent prohibitions enacted by the Legislature and has on its own created the new crime of driving with alcohol on one’s breath The temptation to stretch the law to fit the evil is an ancient one, and it must be resisted . . . our task is to apply the laws that the Legislature has enacted, not those it could have enacted but did not.”); *Hamblen Co. Education Ass’n v. Hamblen Co. Board of Education*, 892 S.W.2d 428, 434 (Tenn. Ct. App. 1994) (“The Board urges us to examine the legislative history of the EPNA [Educational Professional Negotiations Act] [W]e

enforce the "plain meaning" of the statute,³⁴³ but the rejection of legislative history has generally been successful.

VIII. CONCLUSION

As legislatures pass more statutes which are increasingly complicated and overlap more with one another, courts will be faced with more problems of statutory interpretation. Methods for interpreting statutes must be carefully scrutinized so that courts interpret laws properly. While legislative history is just one of many tools for interpretation, it is

resist the temptation to visit the morass which is the 113 pages of transcript of legislative debate on the initial enactment of the EPNA, filled as it is with what are arguably partisan statements on both sides of the debate."); *Hayes v. Continental Ins. Co.*, 872 P.2d 668, 673 (Ariz. 1994) (en banc) ("Divining Congress' intent by examining legislative history has been derided by Justice Scalia as 'the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends' Nevertheless, when a statute's meaning is disputed, we believe it is important, though not always dispositive, to review the statute's legislative history to find, if possible, any shared legislative understanding of the relevant language In this case, however, the history of (the statute in question) discloses few recognizable faces, friendly or otherwise, in the legislative crowd."); *Marposs Corp. v. City of Troy*, 514 N.W.2d 202, 207, n.2 (Mich. Ct. App. 1994) (Taylor, J., dissenting) ("Legislative histories are always suspicious."); *People v. Vauqhan*, 19 Cal. Rpt. 2d 577, 583 (Cal. Ct. App. 4 1995) ("If the cited legislative history were more informative it would still be a weak basis for construction; the absence of information here renders it largely useless."); *Mozo v. State of Florida*, 632 So. 2d 623, 637 (Fla. Dist. Ct. App. 1994) (Farmer, J., concurring) ("I am generally not willing to construe statutes by the currently popular device of consulting what I regard as the tea leaves of legislative history For my taste, we might just as meaningfully send to know what the oracle at Delphi said. I confess to standing with Justice Scalia about this use of legislative histories."); *Morris v. Franchise Tax Board*, 22 Cal. Rpt. 2d 577, 583 (Cal. Ct. App. 1993) ("Great mischief can be wrought by reference to legislative history as an expression of legislative intent.").

See also *J.A. Jones Constr. Co. v. Superior Court of Orange Co.*, 33 Cal. Rptr.2d 206 (Cal. Ct. App. 1994). The court in *J.A. Jones* stated, "There are those who would say that even in looking at legislative history we were on shaky ground [W]e must acknowledge that the criticisms of judicial use of legislative history are formidable indeed. Legislative history has become contaminated by documents which are more aimed at influencing the judiciary after the bill is passed than explaining to the rest of the legislature what the bill is about before it is passed." *Id.* at 211. In support of its position, the court presented lengthy citations for criticism of legislative history from William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L.REV. 621 (1990), but ultimately concluded, "[f]ormidable as these criticisms are, they do not warrant a blanket rule against all use of legislative history." *Id.*

343. See, e.g., *Unzuata v. Ocean View School Dist.*, 8 Cal. Rptr. 2d 614 (Cal. Ct. App. 1992). In the *Unzuata* case, the court followed a very strict reading of the plain text and compelled a school district to provide two years of back pay for a teacher who had been suspended following an arrest on a drug charge which had been subsequently diverted after successful counseling. *Id.* at 616. The teacher could have been fired, but the school district gave him a second chance. *Id.* Upon being reinstated, the teacher sued the school district for backpay, even though he had been working and earning money at another job during the suspension. *Id.*

commonly used by most judges in both federal and state courts.

Until Justice Scalia was appointed to the Supreme Court, criticism of the use of legislative history existed, but it lacked significant influence over courts across the country. In less than a decade, Justice Scalia's decisions have managed to rekindle the debate over the use of legislative history. The Supreme Court is where the most influential debate over the rise of textualism relative to the use of legislative history will take place. Justice Scalia will lead those opposed to the use of legislative history. Many expect Justice Breyer to be the leading defender of the use of legislative history. That is why it is so important to dissect what Justices Scalia and Breyer say about legislative history.

Justice Breyer advocates cautious use of legislative history. While his arguments are well reasoned, many in the legal community are not as cautious with their use of legislative history. Some go as far as to abuse legislative history to forward their political or social agendas.

Justice Scalia definitely raises valid concerns about the use of legislative history. Many types of legislative history are too far removed from the legislative process to have legitimacy. In many cases legislative history is indeterminate. Legislative history is also susceptible to manipulation. Advocates of the use of legislative history can downplay these problems, but they clearly exist.

It is certainly true that other tools for interpretation can be abused. One could selectively use canons to arrive at a result which they favored. However, in most cases, manipulation of canons and plain meaning is easier to detect than manipulation of legislative history. Legislative history usually consists of several slivers of statements plucked from reams of floor statements or early drafts of legislation. What is relevant? How far back does one look? Which sources can be trusted? While one can make reasonable judgments on such questions, the entire inquiry contains a multitude of problems.

Justice Scalia has laid out general guidelines for the proper inquiry into legislative history. These guidelines have been more fully developed by those like Judge Easterbrook on the Seventh Circuit Court of Appeals. Courts should use legislative history to find what the words in the statute mean, not to discover what the legislature intended the statute to do. Statutes are law, not evidence of law.³⁴⁴ This view of statutory interpretation is much like a judge interpreting a contract. Just as the parole evidence rule prevents evidence of outside agreements

344. *In re Sinclair*, 870 F.2d at 1340, 1343 (7th Cir. 1989).

which contradict the written contract, so to should legislative history be excluded from review when it contradicts the plain meaning of the statute.

Implementing the appropriate approach to interpret statutes and achieving the proper result is much easier said than done. Justice Frankfurter recognized this fact:

Whether a judge does violence to language in its total context is not always free from doubt. Statutes come out of the past and aim at the future. They may carry implicit residues or mere hints of purpose But a line does exist between omission and what Holmes called "misprision or abbreviation that does not conceal the purpose." Judges may differ as to the point at which the line should be drawn, but the only sure safeguard against crossing the line between adjudication and legislation is an alert recognition of the necessity³⁴⁵ not to cross it and instinctive, as well as trained, reluctance to do so.³⁴⁶

However, that difficulty does not release judges from their duty to adhere to the meaning of the language in the statute.

The decisions and trends formed in the Supreme Court will work their way down to state courts across the country. While state courts hear many of our nation's cases, little has been written on the use of legislative history in state courts. Obviously, it is critical to know the tendencies of state court judges because there is such a wide discrepancy in mode of analysis between the textualists and those who reference legislative history.

Wisconsin state courts, which seem to be typical in their consideration of legislative history, do not follow a clear Scalia-like textualist analysis. While a number of Wisconsin judges hesitate to look at legislative history, there is no outright rejection of legislative history as in some courts like the Supreme Court of Nebraska. While Wisconsin courts rely too heavily on legislative history (which has produced some unfortunate or questionable decisions), there is not too much abuse of legislative history in Wisconsin. There are a couple of reasons why problems with legislative history may not be as great in state courts. First, there is simply not as much legislative history to rely upon for state laws. While states hold hearings and have debates, the process is not nearly as extensive as for most federal laws. State courts have less to go through,

345. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM L. REV. 527, 535 (1947).

346. *Id.*

and therefore have less of an opportunity to find faulty legislative history. Second, state courts tend to deal with less politically charged issues than federal courts. While there are plenty of heated controversies at the state level (e.g., cases involving parental rights, or insurance claims), state cases deal more with "lawyers' laws" and things which do not generate the same public attention. However, these issues are still important, and legislative history must still be used appropriately—if at all.

The best course would be to strike a compromise between Justices Scalia and Breyer. There are very few cases where legislative history can produce a clear answer that could not be found by using a different method. However, there are still those few cases where legislative history (when carefully used) provides the best means of understanding a statute. Both state and federal courts would do well to not only reduce the use of legislative history, but also be much more selective and careful with its use.

The current composition of the Supreme Court might be the ideal way to strike this compromise between textualists and those who refer to legislative history. Having two or three textualists on the Court has forced the other justices to be much more careful with their use of legislative history by either using more definite examples or abandoning its use altogether to assemble a five-vote majority. If an opinion contains the use of legislative history which is too tenuous, justices will write their own concurrences, and the statement by the Court will be weakened. While Wisconsin does not have such a composition on its Supreme Court, the same dynamics could happen. Such a composition on the Wisconsin Supreme Court would reduce the misuse of legislative history and improve the quality of statutory interpretation.

